Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1457

THE LUNDY PACKING COMPANY, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

No.

THE LUNDY PACKING COMPANY, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

Petitioner, The Lundy Packing Company, by and through its counsel, Haynsworth, Baldwin and Miles, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on January 26, 1977, in which enforcement was granted in part and denied in part of the Order of the National Labor Relations Board which was entered on March 19, 1976. The decision of the Administrative Law Judge of the National Labor Relations Board was entered on May 28, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit (No. 76-1330) is not yet officially reported. The opinion of the National Labor Relations Board (Board) is reported at 223 NLRB No. 36, 91 LRRM 1586, 1975-76 CCH NLRB ¶ 16,698. The opinions are reprinted in the Appendix commencing on pages 1 and 3, respectively. The opinion of the Administrative Law Judge is also reported at 223 NLRB No. 36 and is reprinted in the Appendix on page 7.

JURISDICTION

The judgment of the court of appeals was entered January 26, 1977. Petitioner's Petition for Rehearing *En Banc* was denied by the Court of Appeals for the Fourth Circuit on March 18, 1977. Petitioner's Motion to Stay Issuance of Mandate Pending Petition for Certiorari was granted for a period of thirty (30) days on March 24, 1977. This court has jurisdiction to review the judgment by Writ of Certiorari under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

On July 7, 1974[1] the employees met and decided that if employee Ules Jackson was fired on July 8, they would walk out on strike. Jackson was discharged on July 8, but his discharge was later declared to be lawful. However, despite the specific language of the strike vote, both the Administrative Law Judge and the Board concluded that the July 8 strike was based upon other unfair labor practices which had occurred several weeks earlier: specifically, a discharge on May 24, a discharge on June 18, and four instances each involving an alleged coercive statement by supervisors. One of these earlier unfair labor practices, drawn from comments made by Burrows T. Lundy, president of the company, during his May 8 speech, was ultimately declared to be *lawful* by the Court of Appeals for the Fourth Circuit. In spite of this fact, the Court of Appeals for the Fourth Circuit affirmed the Judge's and the Board's decisions that the July 8 strike was an unfair labor practice strike. The question presented is:

> 1. Did the Judge, the Board and the Court of Appeals for the Fourth Circuit apply an incorrect standard in deciding that the July 8 strike was caused by Petitioner's unfair labor practices, when it is clear upon the record that the clear motivating force which was the admitted primary and substantial cause of the strike was the *lawful* discharge of employee Ules Jackson?

[1] All dates are in 1974 unless otherwise indicated.

STATUTORY PROVISIONS INVOLVED

National Labor Relations Act:

> Section 8(a)(1) [29 U.S.C. § 158(a)(1)]
>
> "It shall be an unfair labor practice for an employer – (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title;"
>
> Section 8(a)(3) [29 U.S.C. § 158(a)(3)]
>
> "It shall be an unfair labor practice for an employer – (1) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

STATEMENT OF THE CASE

I. Jurisdiction Below

This case was before the Court of Appeals for the Fourth Circuit on a Petition for Review filed by Petitioner in the instant case, seeking review of the Decision and Order of the National Labor Relations Board which issued on March 19, 1976. The Court of Appeals for the Fourth Circuit possessed jurisdiction under Section 10(f) of the National Labor Relations Act, 29 U.S.C. Section 151, *et seq.*, based upon the fact that the Petitioner has offices and transacts business in the city of Clinton, North Carolina, within the jurisdiction of the Court of Appeals for the Fourth Circuit.

II. Background

Petitioner slaughters hogs at its plant in Clinton, North Carolina. The organizing drive by Local 525, Meat & Allied Food Workers Union, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO (Union) began around April 1.

Thereafter, Petitioner made various efforts to defeat the organizing effort. The Board found that between April 1 and July 8, Petitioner, through its supervisors: (1) made statements to employees Ellen Raynor (on June 6), and Ules Jackson

(on or about June 14 and June 17), respectively, concerning "parties" they were attending which created an impression of surveillance; (2) interrogated Ellen Raynor on June 6; and (3) unlawfully discharged employees Willard Chavis and Roy Gene Wilson on May 24 and June 18, respectively. The Board further found that the company's president, Mr. Lundy, made unlawful statements in his May 8 speech. The Board further found that an unenforced no-distribution rule was unlawfully broad and that the July 8 walkout was an unfair labor practice strike. The court of appeals affirmed the Board's decision except that it held President Lundy's May 8 speech to be lawful.

III. The Strike of July 8

On Sunday, July 7, some twenty-three (23) employees met at a night club in Warsaw, North Carolina. The meeting was presided over by employee organizing committee chairman, Johnny Burgess, who sat at the head table with three other employees and by two union representatives, Elsie Hales and James Lawrence. The decision to strike was made that night by vote, and in that regard, the sole proposition actually voted on in this meeting was stated by union representative Lawrence:

> "Q. What was the proposition voted upon?
> A. The proposition voted upon was if Ules Jackson was fired when he went to work on Monday, then they would know that the Company intentions was (sic) to fire all of the union people until they were all fired out of the plant. And, if he was fired Monday . . . ."

General Counsel's witness Otis Simmons also testified concerning the strike vote proposition:

> "Q. What was the proposition voted on?
> A. He asked all in favor — Johnny Burgess asked all that was in favor; you know; of a walkout if Ules Jackson would be fired that morning; next morning which was July 8, how many was in favor of the walkout."

The vote was taken on this proposition, and the next morning, July 8, Ules Jackson was fired and the walkout began. The discharge of Jackson was *lawful.*

The Board and the court below merely affirmed the Administrative Law Judge's finding that the strike was an unfair labor pracaice strike. The Administrative Law Judge based his conclusions concerning the strike upon the following findings of fact:

> "It was decided that should Jackson be discharged they would strike. Jackson was discharged and a strike was called. The strike thus was triggered by Jackson's discharge which has not been found to be unlawful. *However, while the immediate impetus of the strike was Jackson's discharge, the proximate cause of the strike was the fear that Respondent had means of ascertaining who the union supporters were and would discharge them one at a time.* This fear was generated by the Company's unlawful activities, found above, and by the series of discharges commencing with Chavis' termination on May 24 and including Wilson's discharge on June 18, both of which I find were unlawful." (Emphasis added.)

The Judge's conclusion that the employees feared being "found out" and fired was based in part on the remarks of Petitioner's president, Lundy, in the May 8 speech about employers having learned who signed union cards when employees were compelled to testify in Board proceedings about the cards. Thus, the Judge concluded:

> "The speech was intended to dangle a carrot and a big stick before the audience. On the one hand, reference was made to the favorable conditions of work. On the other, the employees were told that the Company did not want a union, was not going to have a union, and would do everything it could within the confines of the law to keep out a union *and the employees also were warned of the possibility that the names of those who signed union authorization cards would become known to the Company.* When coupled with the reminder that

was distributed with the pay checks two days later, it is not surprising that the *employees remembered in differing ways that Lundy had threatened that their jobs were in jeopardy – because that is exactly what, using artful phrases, Lundy intended to tell them.*" (Emphasis added.)

But, this support for the unfair labor practice strike finding was *removed* by the finding of the court below that the May 8 speech was lawful! Therefore, all that remains of the Board's "proximate cause", discussed above, is the "fear that . . . [the Company] would discharge the [union supporters] one at a time". *But*, the testimony of the Board's witness Lawrence reveals that what created this "fear" among the employees was *not* the discharges of Wilson and Chavis, *but rather the discharge of Ules Jackson (which was later found to be lawful)*. Thus, Lawrence testified pursuant to questions from the Board attorney that the sole proposition voted on when the strike vote was taken on July 7 was:

"Q. What was the proposition voted upon?

A. *The proposition voted upon was if Ules Jackson was fired* when he went to work on Monday, *then they would know that the Company intentions was to fire all of the union people until they were all fired out of the plant*. And, if he was fired Monday . . . ." (Emphasis added.)

That this was the *sole* proposition was also confirmed by the testimony of Board witness Simmons. What made them afraid of being "found out" and fired was the speech and the discharge of Ules Jackson – both of which were lawful. Therefore, what made them walk out were two *lawful acts*.

REASONS FOR GRANTING THE WRIT

1. ***This Case Presents an Important Question of Federal Law Which Has Not Been, But Should Be Settled By This Court.***

The question which is squarely presented by the facts of this case has not been decided by this Court. However, this

question is of immense importance not only to the parties involved, but also to employers, unions and employees everywhere. When a strike occurs, hundreds of persons are out of work. Strikes occur for numerous reasons, occasionally one of which is to protest the unfair labor practice or practices committed by an employer. Strikers who have been engaged in an unfair labor practice strike are entitled to reinstatement to their former jobs even if the employer has hired permanent replacements. *N.L.R.B. v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

Strikes also occur for reasons which are *not* related to an employer's unfair labor practices; such strikes are designated as economic strikes. When an economic strike occurs, the employer is free to hire permanent replacements for the strikers and may lawfully refuse a striker's request for reinstatement if he has been permanently replaced at the time the strike is ended. *N.L.R.B. v. Mackay Radio & Telegraph Co., supra*, at 345, 346.

It is immediately evident that the decision whether an economic strike or an unfair labor practice strike exists is extremely critical. If the strike is designated as an unfair labor practice strike, large backpay amounts, such as in the instant case, are often awarded.

Since such large personal and proprietary rights are determined by the ultimate label hung on the strike by the Board, it is imperative that a precise definition of what constitutes an unfair labor practice strike exists. However, the courts of appeal are totally inconsistent in their definitions, with disagreement occurring not only among the circuit courts, but also within cases decided in the *same* circuit! This important area of uncertainty can only be settled by this Court's granting of the Petition for Certiorari in this case, and subsequently giving a precise definition of what constitutes an unfair labor practice strike.

II. *A Survey of the Law in the Circuits Clearly Demonstrates That There is Disagreement on the Definition of an Unfair Labor Practice Strike.*

A. The First Circuit has established at least two standards which it utilizes to define an unfair labor practice strike. In *Simmons, Inc., v. N.L.R.B.*, 315 F.2d 143, 146 (1st Cir. 1963), the court articulated a standard by which a strike would be defined as economic if the employer could demonstrate that the strike would have occurred irrespective of any unfair labor practices.

Several years later, the same court stated that a strike would be an unfair labor practice strike if the employer's unfair labor practice was "at least one cause" of the strike. *N.L.R.B. v. Sea-Land Service, Inc.*, 356 F.2d 955, 966 (1st Cir. 1966), *cert. denied*, 385 U.S. 900 (1966).

Two years later, the same court avoided giving any definition when it stated that the strike was "caused by" the employer's unfair labor practices. *N.L.R.B. v. Call, Burnup & Sims, Inc.*, 393 F.2d 412, 415 (1st Cir. 1968).

B. The Second Circuit has apparently established two standards by which an unfair labor practice strike is defined. In *N.L.R.B. v. Remington Rand, Inc.*, 94 F.2d 862, 872 (2d Cir. 1938), the court stated that a strike would be economic if it would have occurred irrespective of any employer unfair labor practices.

Twenty-five (25) years later, the same court stated that an unfair labor practice strike would exist if "at least one cause" of the strike was the employer's unfair labor practice. *N.L.R.B. v. Fitzgerald Mills Corp.*, 313 F.2d 260, 269 (2d Cir. 1963), *cert. denied*, 375 U.S. 834 (1963).

C. The Third Circuit has apparently established two standards by which an unfair labor practice strike is defined. In *N.L.R.B. v. Stackpole Carbon Company*, 105 F.2d 167, 176 (3d Cir. 1939), the court stated that a strike would be economic if it would have occurred irrespective of any employer unfair labor practices.

In 1972, the same court stated that an unfair labor practice strike would exist if the employer's unfair labor practice "had

anything to do with causing it". *N.L.R.B. v. Cast Optics Corp.*, 458 F.2d 398, 407 (3d Cir. 1972), *cert. denied*, 409 U.S. 850 (1972).

D. The Fourth Circuit's definition of an unfair labor practice strike is extremely unsettled. In 1965, the court stated that "the underlying cause" of an unfair labor practice strike must be the employer's unfair labor practices. *N.L.R.B. v. Southland Cork Company*, 342 F.2d 702, 707, 708 (4th Cir. 1965).

However, two years later the same court articulated two different tests within the same opinion, stating that "a causal connection" was necessary at one point and that the "*clear motivating force* prompting the strike" was necessary at another. (Emphasis added.) *Filler Products, Inc. v. N.L.R.B.*, 376 F.2d 369, 379 (4th Cir. 1967).

E. Although the language which the Fifth Circuit has used to describe its definition of an unfair labor practice strike has differed, that court has apparently settled on "a contributing cause" standard. In *Winter Garden Citrus Products Cooperative v. N.L.R.B.*, 238 F.2d 128, 129 (5th Cir. 1956), the court stated that the strike was "bottomed in part" upon the employer's unfair labor practices and was therefore an unfair labor practice strike. In *Southwestern Pipe, Inc. v. N.L.R.B.*, 444 F.2d 340, 352 (5th Cir. 1971), the court enunciated a standard of "a contributing cause".

F. The Sixth Circuit has concentrated on two phrases in defining the unfair labor practice strike. Under one standard, the employer must establish that the strike would have occurred irrespective of the employer's unfair labor practices. *Larand Leisurelies, Inc. v. N.L.R.B.*, 523 F.2d 814, 820 (6th Cir. 1975); *Philip Carey Mfg. Co. v. N.L.R.B.*, 331 F.2d 720, 729 (6th Cir. 1964), *cert. denied*, 379 U.S. 888 (1964); *N.L.R.B. v. Wooster Div. of Borg-Warner Corp.*, 236 F.2d 898, 907 (6th Cir. 1956), *rev'd on other grounds* at 356 U.S. 342 (1957).

In two of the same cases, the court articulated the "contributing cause" standard. *Larand Leisurelies, Inc., supra; Wooster Div. of Borg-Warner Corp., supra.*

G. The Seventh Circuit has stated that an unfair labor practice strike will exist if it is "at least partly a result" of the employer's unfair labor practices. *N.L.R.B. v. My Store, Inc.*, 345 F.2d 494, 498 (7th Cir. 1965), *cert. denied*, 382 U.S. 927 (1965).

H. The Eighth Circuit has stated that an unfair labor practice strike will exist if the employer's unfair labor practices were "a factor" in causing the strike. *N.L.R.B. v. Columbia Tribune Publishing Company*, 495 F.2d 1384, 1392 (8th Cir. 1974); *N.L.R.B. v. Imperial Outdoor Advertising*, 470 F. 2d 484, 486 (8th Cir. 1972).

I. The Ninth Circuit has apparently decided that an unfair labor practice strike will exist if "one of the reasons" or "one alternative purpose" of the strike is to protest an employer's unfair labor practice. *N.L.R.B. v. International Union of Operating Engineers*, 293 F.2d 319, 323 (9th Cir. 1961); *N.L.R.B. v. West Coast Casket Co.*, 205 F.2d 902, 907 (9th Cir. 1953).

J. The decisions of the Circuit Court of Appeals for the District of Columbia have little or no consistency. In *General Drivers & Helpers Union, Local 662 v. N.L.R.B.*, 302 F.2d 908, 911 (D.C. Cir. 1962), *cert. denied*, 371 U.S. 827 (1962), the court stated that an unfair labor practice strike would exist if the employer's unfair labor practices "had anything to do with" the strike. This standard was reiterated in *United Steelworkers of America, AFL-CIO v. N.L.R.B.*, 405 F.2d 1373, 1337 (D.C. Cir. 1968). However, this apparently contradicts the court's statement that the unfair labor practice must be the "principal cause of the strike" which was articulated earlier that year. *United Steelworkers of America, AFL-CIO, Local 5571 v. N.L.R.B.*, 401 F.2d 434, 437 (D.C. Cir 1968), *cert. denied*, 395 U.S. 946 (1968).

To further confuse the matter, the court stated in *Teamsters Local 992 v. N.L.R.B.*, 427 F.2d 582, 587 (D.C. Cir. 1970), that a strike would be economic if it would have occurred regardless of the employer's unfair labor practices. This language was reiterated in *Allied Industrial Workers v. N.L.R.B.*, 476 F.2d 868, 882 (D.C. Cir. 1973). However, *Allied Industrial Workers, supra*, also stated that the unfair

labor practice must be "a significant factor" in causing the strike if that strike is to be defined as an unfair labor practice strike.

These decisions have thus created a great deal of uncertainty and have made it nearly impossible for an employer to properly evaluate its position once replacements have been hired and the strikers offer unconditionally to return to work. One commentator has recently observed, "All that can be said with confidence is that if a strike occurs shortly after the employer has committed a serious unfair labor practice, the strikers will be treated as unfair labor practice strikers." R. GORMAN, *Labor Law: Unionization and Collective Bargaining*, Ch. 17, Sec. 3, at 339 (1976). Thus, only the most obvious cases can be predicted with any certainty. This uncertainty has cost the employer and, for that matter, all parties, both time and money in the instant case. This Court should grant Certiorari in the instant case, not only to finally resolve this dispute, but also to precisely define the unfair labor practice strike so that employers may in the future pattern their conduct accordingly, and be able to properly evaluate their legal position when a strike occurs after an alleged (but not yet proven) unlawful act.

III. *This Important Question Was Wrongly Decided Below.*

The court of appeals did not even discuss or articulate the question that is presented in this case. The Administrative Law Judge stated that the employer must ". . . demonstrate that the strike would have occurred . . . irrespective of its unfair labor practices." (A. 63). Both the Board and the Court of Appeals for the Fourth Circuit affirmed this portion of the Administrative Law Judge's opinion without comment.

Petitioner believes that the decisions below in the instant case were based upon an incorrect standard. The opinions below, by both the Board and the court, should have stated that Petitioner's unfair labor practices were the principal or motivating cause of the strike. The use of any less stringent standard places the employer in the position both of carrying an impossible burden of proof, and of being completely unable

to properly assess its position with regard to strike replacements due to the vagueness of the standard to be applied. Further, in view of the confused state of the law, it is impossible for an employer to know what burden of proof exists. As the law currently stands, it is impossible for any employer to determine whether an economic or unfair labor practice strike exists until a final decision is rendered by this Court.

CONCLUSION

For the reasons stated, the Petition for Certiorari should be granted.

Dated this 22nd day of April, 1977.

Respectfully submitted,
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APPENDIX

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Opinions below

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1330

THE LUNDY PACKING COMPANY, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

LOCAL 525, MEAT & ALLIED FOOD WORKERS UNION, AMALGAMATED MEAT CUTTERS and BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, *Intervenors*.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Argued: December 7, 1976. Decided: January 26, 1977.

Before WINTER and RUSSELL, Circuit Judges, and Field, Senior Circuit Judge.

Thomas G. Greaves, III, James M. Miles (Haynsworth, Baldwin and Miles on brief) for Petitioner; Alan Banov, Attorney, National Labor Relations Board (John S. Irving, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Carl L. Taylor, Associate General Counsel, Elliott Moore, Deputy Associate General Counsel, National Labor Relations Board on brief) for Respondent; Irving M. King (Thomas D. Allison, Cotton, Watt, Jones, King & Bowlus on brief) for intervenor.

PER CURIAM:

In this proceeding the petitioner-employer seeks to review and set aside an order of the National Labor Relations Board finding it guilty of unfair labor practices in a number of particulars and providing certain remedial relief.[1] The Board, in turn, cross-petitions for enforcement of its order, and Local 525, Meat, Food and Allied Workers Union, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO has intervened in support of the Board.

We enforce the order of the Board except for its finding that the speech of the petitioner's president to the employees was "unlawfully coercive" in violation of the Act. In our opinion such speech constituted protected speech and may not be found to be a violation of the Act. *NLRB v. Gissel Packing Co.* (1969) 395 U. S. 575, 616-20; *N.L.R.B. v. Threads, Incorporated* (4th Cir. 1962) 308 F.2d 1 at 8 and 9; *N.L.R.B. v. Ogle Protection Service, Inc.* (6th Cir. 1967) 375 F.2d 497 at 505. The other findings and conclusions of the Board, on the other hand, are supported by substantial evidence, and the order of the Board will be enforced as to them.

ENFORCEMENT GRANTED
IN PART AND DENIED
IN PART

[1] 223 NLRB No. 36.

DECISION AND ORDER

On May 28, 1975, Administrative Law Judge Herbert Silberman issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions, a supporting brief, and a brief in limited support of the Administrative Law Judge's Decision,[1] and the General Counsel filed cross-exceptions and a supporting brief. The Charging Party filed limited cross-exceptions and an answering brief in opposition to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge with the following clarification and to adopt his recommended Order.

Contrary to our dissenting colleague and in agreement with the Administrative Law Judge, we find that Respondent violated Section 8(a)(1) of the Act by certain remarks made by Respondent's president, Lundy, during a speech to all employees on May 8, 1974. In so concluding, we are persuaded that any doubt about the reasonably inhibitory effect of Lundy's remarks on employees is removed when these remarks are viewed in the context of Respondent's hostility to unionization and its other unlawful conduct herein.

Respondent's antiunion hostility is unmistakable. President Lundy's yearly practice has been to warn the employees in his close-of-the-year speeches that Respondent would not tolerate a union in the plant. Lundy repeated this theme in his May 8 speech. Lundy clearly meant what he said and, as the evidence here indicates, Respondent was quite willing to resort to unlawful measures to counter the employees' organ-

[1] Respondent's request for oral argument is hereby denied since the record, the exceptions, and the briefs adequately present the issues and positions of the parties.

izational efforts. Thus, Respondent maintained in force a rule which unlawfully prohibited employees from distributing union literature on company property; it interrogated employees about the union activities of other employees; it created the impression that the union activities of its employees were under surveillance; and it unlawfully discharged prominent union adherents.

It is in this context that Lundy's speech to the assembled employees on May 8 must be evaluated. Thus, Lundy's remark that "We do not want a union in this company, and we are not going to have one," in these circumstances, clearly implies that Respondent would resort to illegal means to keep the Union out. However, our dissenting colleague disagrees with this interpretation, citing the fact that during the same speech Lundy explained that he would use only legal means to achieve this objective. Unlike our dissenting colleague, we are unwilling to interpret Lundy's initial statement in a context divorced from a consideration of the means actually employed to carry out this threat. Respondent's unlawful conduct and not its self-serving explanation demonstrates best what Respondent intended to convey to the employees and that was that Respondent was prepared to do whatever was necessary to keep the Union out, including resorting to illegal measures. In short, we believe that any doubts about the unlawful implication of Lundy's remark that "we are not going to have [a union]," were removed by Respondent's unlawful conduct which speaks louder than its words.[2]

Similarly, we view Lundy's remarks concerning the nonsecrecy of union cards as an open attempt to discourage union activity. In this connection, we agree with the Administrative Law Judge that "there was no reason for informing employees

[2] Our dissenting colleague's reliance on the absence here of explicit warnings of "trouble" or "harm" to distinguish *Kellwood Co.*, 75 NLRB 559 (1969), is misplaced. Those warnings there merely served to confirm the otherwise threatening nature of Plant Manager Garrett's remark that: "We do not want a union in the plant and we will use every legal means at our disposal to keep it out of here." Here Respondent's other unlawful conduct serves the same purpose.

that they might be required to testify in open court other than to let them know that the names of union adherents could be ascertained and appropriate reprisals taken." *N.L.R.B. v. Finesilver Manufacturing Co.*, 400 F.2d 644, 646 (C.A. 5, 1968). Again, we believe that our dissenting colleague, in urging the reversal of this finding, has failed to give proper significance to the remarks in the overall context in which they were made.

Under the circumstances here, we find that Lundy's remarks interfered with the free exercise of employee rights and therefore violated Section 8(a)(1) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, the Lundy Packing Company, Clinton, North Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D. C. Mar 19, 1976

John H. Fanning, Member
Howard Jenkins, Jr., Member
National Labor Relations Board

(SEAL)

CHAIRMAN MURPHY, concurring and dissenting:

I concur with my colleagues in adopting the Administrative Law Judge's Decision, except that I would not adopt his findings relating to the speech given by Respondent's president, Lundy, on May 8, 1974.

My colleagues agree with the Administrative Law Judge that Respondent violated Section 8(a)(1) when – during a speech – Lundy told employees, "We do not want a union in this company, and we are not going to have one." Any possibility that it could be construed as a threat was immediately removed by Lundy's making it clear, in the next sentence, that

he was going to use only lawful means to combat the Union.[3] Specifically, Lundy stated, "We are going to use every legal means we can to keep the union out." *Kellwood Co.*, 175 NLRB 559, relied on by the Administrative Law Judge, is distinguishable. There the employer referred to the signing of the cards as being a "mistake" and the beginning of "trouble" which carried a connotation of adverse consequences for supporting the union. Here, no similar comments were made. Cf. *Mt. Ida Footwear Company, a Division of Munro Company, Inc.*, 217 NLRB No. 165 (1975). Nor do I subscribe to the majority's view that the subsequent commission by Respondent of unfair labor practices[4] "serves the same purpose" as if such comments had been uttered. The first of these unlawful acts occurred over 2 weeks after the speech, and the other violations did not take place until about a month or more from Lundy's address to the employees. While these violations indicate that Respondent eventually decided to engage in illegal conduct, they are far enough removed in time from the speech so that it does not automatically follow that when Lundy made the above statements, Respondent had no real intention "to use . . . legal means to keep the Union out" as he proclaimed.

I also disagree with my colleagues' adoption of the Administrative Law Judge's findings that Respondent further violated Section 8(a)(1), by Lundy's telling the employees, during the same speech: "Don't ever sign anything for a union

[3] That this statement connotes antiunion hostility does not color it with illegality as my colleagues seem to suggest by their reference to the fact that it represented a reiteration of part of President Lundy's annual year-end message to employees – given apparently with or without a union in the picture – that among other things he did not want a union in the plant.

[4] I do not believe that in relation to Lundy's remarks in question, any significance attaches to the fact that an unlawful no-distribution rule then existed. Indeed, that rule had been in effect before the union campaign began and applied to distribution of any kind of material. There is no evidence that it was disparately enforced. In such circumstances, I do not think it provides a valid basis for finding that Lundy's statements were threatening in nature, or were subject to being so construed by the employees.

without knowing all the facts about what you are getting into, and if someone tells you that no one will ever know who signed, they are not telling the truth. Right here in North Carolina, employees have been forced to come in and testify in an open court about signing union cards." In finding this violation, the Administrative Law Judge reasoned that Lundy was telling employees that he would find out who was signing cards and that, when he did, he was going to fire them as he had done in the case of discriminatee Willard Chavis. I cannot accept that tortured view of Lundy's statement. There is no threat when employees are informed of the fact that in some circumstances those who signed union authorization cards may be required to testify. Nor can I find any basis here for saying that Respondent was thereby threatening discharge or some other adverse consequences should employees sign cards. Certainly, the fact that Respondent unlawfully discharged Chavis does not warrant a finding that every comment constitutes a threat of discharge should Respondent in the future learn through legitimate means who signed cards.

I would, therefore, dismiss both of the above allegations. In all other respects I concur in affirming the findings and conclusions of the Administrative Law Judge.

Dated, Washington, D. C. Mar 19, 1975

Betty Southard Murphy, Chairman
National Labor Relations Board

DECISION

Statement of the Case

HERBERT SILBERMAN, Administrative Law Judge: Upon a charge and an amended charge filed on July 3 and 17, 1974, respectively, in Case 11–CA–5790 and a charge and an amended charge filed on August 19 and September 20, 1974, respectively, in Case 11–CA–5837 by the Charging Party above-named, herein referred to as the Union, a complaint, dated September 26, 1974, was issued in these cases, which were consolidated by order of the Regional Director, alleging that the Respondent, The Lundy Packing Company, herein referred to as the Company, has engaged in and is engaging

in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended. Respondent duly filed an answer denying that it has engaged in the alleged unfair labor practices. A hearing in this proceeding was held on various days between December 5, 1974, and January 7, 1975, in Clinton, North Carolina. At the hearing General Counsel amended the complaint in various respects and Respondent amended its answer, among other things, affirmatively to allege that a strike which began on July 8, 1974, did not constitute an activity subject to the protection of the Act. Extensive posthearing briefs were filed with the Administrative Law Judge which have been carefully considered.

Upon the entire record in the case, and from my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. The Business of Respondent

The Company, a North Carolina corporation, is engaged in the business of processing meat from hogs. During the 12 months preceding the issuance of the complaint, the Company received at its plant in Clinton, North Carolina, goods and products valued in excess of $50,000 which were shipped to it through channels of interstate commerce from points outside the State of North Carolina, and, during the same period, the Company shipped from its plant to places outside the State of North Carolina through channels of interstate commerce products valued in excess of $50,000. The complaint alleges, the answer admits, and I find that the Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *The Issues*

The complaint alleges that the Company unlawfully discharged employees Willard Chavis on May 24, 1974, Roy Gene Wilson on June 18, 1974, and John Faison on June 26, 1974, because of their activities in support of the Union. Respondent's defense is that these employees were terminated for cause.[1] The complaint further alleges that a strike, which began on July 8, 1974, and was still in progress on the dates of the hearing, was caused by Respondent's unfair labor practices and thereafter the striking employees unconditionally offered to return to work but the Company unlawfully has refused to reinstate them to their former positions.[2] The complaint, as amended, lists 44 striking employees who have been unlawfully refused reinstatement.[3]

Independent of the alleged unlawful discharges and refusals to reinstate striking employees to their former positions, the complaint alleges violations of Section 8(a)(1) by reason of:

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[1] In the case of John Faison, the Company issued a written reprimand to him on June 26, and he was terminated when he refused to countersign the reprimand under the Company's established policy that employees who refuse to countersign written reprimands will be considered as having quit their jobs. General Counsel does not attack this policy, but contends that the reprimand would not have been issued in the first instance but for Respondent's discriminatory motivation.

[2] General Counsel does not dispute Respondent's contention that the jobs of the striking employees had been filled by permanent replacements when they offered to return to work. Thus, the only issue with respect to the Company's refusal to reinstate the striking employees is whether they are unfair labor practice strikers who were entitled to reinstatement, when applied for, even if it required the discharge of their replacements.

[3] The list initially contained 48 names, but by motion granted at the hearing the following names were stricken from the list: Annie Banks, Willie Grady Hayes, Ruth McLamb, and Arthur Weeks.

(1) A speech made by Company President Burrows T. Lundy, Sr., to the employees on May 8,[4] in which he threatened that he would close down the plant to keep the Union out; threatened that he had a way to find out who had signed union cards; and threatened that the employees were jeopardizing their families and were putting their jobs on the line by signing union cards;

(2) The promulgation, maintenance, and enforcement, since April 8, of a written rule prohibiting the distribution of written or printed matter of any kind;[5]

(3) A threat by Division Superintendent Everett Griffin on April 24 to employee Ruth McLamb[6] telling her that if the employees' union activities are discovered by the Company's president it would cause them to be without jobs;

(4) Interrogation of employee Ruth McLamb by Division Superintendent Everett Griffin on April 24, employee John Faison by Supervisor Fulton Peterson on June 12; and employee Ellen Raynor by Production Manager Clarence Kephart on June 6; and

(5) Creating the impression that the union activities of employees were under surveillance by questions addressed to employee Ules Jackson by Supervisors Fulton Peterson and Randy Penny on June 17, and by a question addressed to employee Ellen Raynor by Division Superintendent Everett Griffin on June 6.

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[4] Unless otherwise indicated all dates refer to the year 1974.

[5] The cited paragraph of the complaint initially alleged the existence of an unlawful no-solicitation rule. At the hearing the complaint was amended to enlarge the allegation to incorporate an unlawful no-distribution rule. In his brief General Counsel moved "to withdraw that portion of the allegation of paragraph 7(g) of the Complaint which alleges said rule to be an invalid no-solicitation rule." The motion is hereby granted.

[6] The complaint as drafted does not identify the employees referred to in the various subparagraphs of par. 7 of the complaint. However, in most instances, General Counsel in his brief furnishes such identification, which I rely on in my discussion of the evidence.

B. *The Company's Operation*

At its plant in Clinton, North Carolina, Respondent slaughters and processes hogs. The Company's products are of high quality and are sold at premium prices. The slaughter of animals and related operations are performed on assembly lines which are timed so that approximately 4,000 hogs are processed each day.

During the times material to this case, the management hierarchy was composed of its president, Burrows T. Lundy, Sr.; the production manager, Clarence Kephart, who was immediately subordinate to the president; and, under the production manager, but also exercising general plant responsibility, the plant manager, Walter Peterson. The various plant departments were headed by superintendents who were aided by assistants. Everett Griffin was kill division superintendent and Carl Brewington was the supervisor in that department. Glenn Clark was cut division superintendent. Clark was absent from work from May 11 until June 10 because of a broken ankle. During the period of his absence, Everett Griffin substituted for him. Subordinate to Clark was Supervisor Fulton Peterson, who was promoted to the position of supervisor about May 10. Prior thereto the supervisor of the cut department was Franklin Knowles who was assisted by Joseph Torraine and Fulton Peterson.[7] Other supervisors were: Paul Vann, acting superintendent of the curing department; Jesse Spell, supervisor in the smoked meat packing department; and Randy Penny, who is no longer employed by the Company, but was the night shipping supervisor. Finally, Charles Moritz was industrial relations manager of the Company.

C. *The Organizing Effort*

About April 1 the Union began to organize the Company's employees. On that day two staff organizers, James Lawrence and Elsie Hales, visited the home of employee Willard Chavis to enlist his support. He agreed to help them and told them

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[7] Knowles and Torraine were terminated during the payroll week beginning May 8.

that he believed a union was needed in the plant because the employees were being driven hard, were subject to harassment by the way the company rules were being enforced, and had no security. Thereafter, the support and assistance of other employees was solicited. The Union held periodic meetings with the employees most frequently at the Royal Garden Club which was operated by employee Ules Jackson in Warsaw, North Carolina. An organizing committee of employees was formed, which included Johnny Burgess, as chairman, and Weldon Underwood.[8]

The Company was firmly opposed to the organization of its employees. It was the practice of Company President Burrows T. Lundy, Sr., annually at his close-of-the-year speech to the employees to remind them of his union antipathy. Thus, in his speech on December 11, 1970, he said, "There have been rumors that there is some union activity among us. I want to go on record and say that we don't want a union and we will do everything we possibly can legally to keep one out." In a speech made on December 10, 1971, he said, "We hear there is (sic) rumors of union activity in the area. We don't want a union, and we will do everything we can legally to keep one out." The same theme was repeated on December 15, 1972, when Lundy said to the employees, "There is one thing we don't want here, that is a union, and we will do everything we can legally to keep one out." Similarly, on December 14, 1973, he informed the employees, "That we don't want a union, and we will do everything we can legally to keep one out."

The Company quickly learned of the Union's organizational drive which began in April 1974. There was a long-standing policy that supervisors were to transmit up the management hierarchial line all information obtained by them regarding union activity among the employees. This practice was formalized on May 9 at a supervisors' meeting. They were

[8] According to James Lawrence, Chavis was a member of the organizing committee until he was discharged on May 24 and Ellen Raynor and Ules Jackson were also on the committee. According to Underwood, in addition to himself and Burgess, the committee was composed of Diane Wilson, Otis Simmons, and Lynwood Owens.

instructed to make written memoranda of any and all conversations with employees about the Union or union activities and pass the memoranda up the management chain to Production Manager Kephart who in turn sent the memoranda to the Company's attorneys. Thus, Respondent's management was fully informed regarding the union activities among its employees.

The Charging Party first learned of the existence of such memoranda at the hearing in this case, particularly during the examination of company witnesses Carl Brewington and Clarence Kephart. Charging Party served *subpoenas duces tecum* on both Kephart and the Company's attorneys calling for the production of such memoranda. A motion was made to quash the subpoenas on the ground that they called for production of privileged communications between client and attorney. After extensive argument the Administrative Law Judge denied the motion. Kephart and the Company's attorneys, nevertheless, refused to produce the supoenaed document. It is estimated that between May 9 and the close of the hearing about 300 such memoranda had been delivered to the Company's attorneys and Kephart testified that approximately 50 to 100 were transmitted during the month of May. In its brief Charging Party contends that it did not seek enforcement of the subpoenas because of its reluctance to delay the close of the hearing. It requests the Administrative Law Judge to apply the adverse inference rule asserting that "The Judge, in short, should draw the adverse inference as to every claim and defense advanced by the Employer. It should be inferred that the documents which the Employer has failed to produce contain evidence that would conclusively establish every violation charged, including, for example, reports proving Company knowledge of Faison's union activities." In support of this position Charging Party cites *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) v. N.L.R.B.*, 459 F. 2d 1329, 1335, 1338, -39 (C.A.D.C., 1972), where the court referred to the adverse inference rule as "more a product of common sense than of common law" and, among other things, stated:

If a party insists on withholding evidence even in the face of a subpoena requiring its production, it can hardly be doubted he has some good reason for his insistence on suppression. Human experience indicates that the most likely reason for this insistence is that the evidence will be unfavorable to the cause of the suppressing party. . . . It is, of course, always possible for the opposing party to seek enforcement of the subpoena in court. But enforcement against a really intransigent party can be costly and time consuming, particularly in administrative proceedings where the enforcement process is of necessity collateral to the main case. . . . The adverse inference rule allows a tribunal to attach weight to a party's intransigence without resorting to the awkward enforcing process. It permits vindication of the tribunal's authority in situations where vindication might, as a practical matter, be impossible otherwise. . . . At the same time, the rule does not deprive the suppressing party of his constitutional right to an enforcement hearing on the subpoena, since he is not required to produce the evidence in question. Rather the tribunal simply utilizes the commonsense inference that if the evidence would do the suppressing party any good, he would readily produce it.[45]

[45] Of course, the adverse inference rule is inapplicable in situations where a party has a constitutional right to suppress the evidence in question. If a party contends, for example, that the evidence would incriminate him or that its production would chill First Amendment freedoms, the Government may not burden the exercise of constitutional rights by attaching an adverse inference to the failure to produce the evidence. . . .

For reasons stated more fully below, I find that Faison was discharged for cause regardless of the Company's knowledge of his union sympathies and activities. Thus, whether or not I were to apply the adverse inference rule to bolster the evidence adduced by General Counsel regarding the Company's knowledge of Faison's union activities, my decision with respect to his termination would not change. To what

extent the documents which have not been produced in response to the *subpoena duces tecum* contain incriminatory evidence is a matter of speculation. Charging Party's request that an adverse inference should be drawn as to every claim and defense advanced by the Company is extreme. In effect it would remove from the case almost all the evidence adduced on Respondent's behalf. While I deplore Respondent's and its counsel's refusal to comply with the *subpoenas duces tecum*, I find no authority to take the drastic action requested by Charging Party. Further, I find no instances where it would be appropriate to apply the adverse inference rule in this case.

D. *Coercion, Restraint, and Interference*

1. The May 8 speech

In early May, in response to the organizational drive which had begun the previous month, the Company took occasions again to remind its employees of its union opposition. Thus with the paychecks which were distributed to the employees on Friday, May 10, the following notice was enclosed:

REMINDER

You are reminded that a union will not serve the best interests of either the Company, its employees, or their families; that the Company does not want a union in its plant; and that the Company proposes to use every available legal means to prevent the establishment of a union. If you are asked to sign a union card or petition, think long and hard and do not sign it.

Burrows T. Lundy
President, The Lundy Packing Company

Two days earlier, during working time, Company President Lundy assembled the employees and read a speech to them. This was the first time that any speech was given to the employees on company time. According to Lundy, in reading the speech he did not deviate from the prepared text. The speech was as follows:

Fellow employees, I have called this meeting to discuss a most serious matter with you. I understand that there is some union activity around the plant, and I want to remind you about our feelings about unions. We do not want a union in this company, and we are not going to have one. We are going to use every legal means we can to keep any union out. We do not believe that a union is in the best interest of you, or your family, or this company. A lot of you will be asked to sign a union card or a petition. You should think long and hard before considering signing one of these cards or a petition. Don't ever sign anything for a union without knowing all the facts about what you are getting into, and if someone tells you that no one will ever know who signed, they are not telling you the truth. Right here in North Carolina, employees have been forced to come in and testify in an open court about signing union cards. We treat the employees right here in this company because we believe that is the way to run a business. We are proud of our wages and benefits here, and you should be too. In fact, last June 4th, we had a five percent increase. This February, a five percent increase, and also May 6, making a total increase of 15% within the last year. You have gotten all of this without paying some of your money to a union in the form of dues, fines, initiation fees, and special assessments, or without ever missing a pay check to a union called strike.

I want to get this thing out in the open so everyone will know where we stand and why. Remember, signing one of these union cards or signing a union petition is just like letting this union put its hand in your pocket book. Thank you.

General Counsel contends, contrary to Lundy, that he departed from his prepared speech and that his remarks included a threat to close the plant in order to keep the union out, and a statement that he had ways to find out who had signed union cards and that employees were jeopardizing their families and putting their jobs on the line by signing

union cards. The testimony of employees John Faison, Ules Jackson, Elwood Raynor, Otis Simmons, Johnny Burgess, and Robert Smith was adduced to support these contentions. As can be expected, their individual recollections of the speech were fragmentary and their versions of what was said not only differed from Lundy's testimony but also in some respects from each other. It is not unexpected that a speech which was as vehemently antiunion as Lundy's speech, in which he said, "We do not want a union in this company, and we are not going to have one," would leave the employees with the impression that direct threats of reprisal had been made. However, I am of the opinion that Burrows T. Lundy was a credible witness and I find that, as testified to by him, the speech he gave was read verbatim from the prepared text.

There is much conflict in the testimony of the witnesses who appeared for the opposing parties in this hearing. In some cases, such as with respect to Burrow T. Lundy's May 8 speech, crediting one version does not necessarily mean that the opposing witnesses were untruthful. The speech was intended to dangle a carrot and a big stick before the audience. On the one hand, reference was made to the favorable conditions of work. On the other, the employees were told that the Company did not want a union, was not going to have a union, and would do everything it could within the confines of the law to keep out a union and the employees also were warned of the possibility that the names of those who signed union authorization cards would become known to the Company. When coupled with the reminder that was distributed with the paychecks 2 days later, it is not surprising that the employees remembered in differing ways that Lundy had threatened that their jobs were in jeopardy – because that is exactly what, using artful phrases, Lundy intended to tell them. In other cases, such as the discharge of Willard Chavis, the undisputed facts so strongly mark the direction of events that resolutions of factual conflicts have only minimal influence upon the decision. However, many instances, such as the June 6 conversation between Ellen Raynor and Clarence Kephart, involve contradictory versions of events where there are no

undisputed facts or objective factors to assist in resolving the conflicts. Then, the decision must turn almost entirely upon an evaluation of the respective credibility of the witnesses. In those cases the findings have been based on the less tangible, more difficult to describe, considerations which fall within the compass of demeanor.

Two witnesses particularly impressed me as being completely truthful. They are Willard Chavis and Ellen Raynor. Both were straightforward, direct, and unhesitating in responding to the questions put to them and both appeared to me to have framed their answers from their individual recollections and not from rehearsed stories. Leaving almost the opposite impression upon me were John Faison and Weldon Underwood whose testimony, particularly on examination by opposing counsel, was guarded and qualified and who seemed to be consciously defending prepared positions rather than testifying from their individual recollections. The persons who were called to testify for Respondent, with relatively unimportant exceptions, were supervisors and other individuals currently employed by the Company. They were aware of President Burrows' bitter and implacable opposition to union representation for his employees. They testified in the presence of Production Manager Kephart and were conscious that their testimony was being recorded. They would be less than human if they were not concerned that any testimony given by them adverse to the Company's position could have an unfavorable impact upon their job opportunities. This is a factor of which I have taken account in assessing the credibility of witnesses. Of course, I also have given consideration to the interest that the various witnesses on both sides have in the outcome of this proceeding.

The transcript of record in this case is long. If I were to resolve every conflict in testimony and analyze each of the many exhibits, this Decision, which is far from brief in any event, would become burdensome without providing compensating benefits to the parties or to any bodies that may review this Decision. I have carefully studied and analyzed the transcript of record, the exhibits in the case, the parties' extensive

briefs, as well as my notes made at the hearing, and my recollection of events. In order to limit the length of this Decision I have not referred to much evidence which I believe can be omitted from the discussion without significantly attenuating the exposition of the evidentiary factors which have impelled my findings. The fact that I have not referred to particular testimony or exhibits does not mean that I have overlooked them in reaching my findings herein.

The purpose of Lundy's speech was to emphasize his opposition to the Union and to dissuade the employees from lending support to it. The Company has the right to make its opposition to unionization known. However, in doing so, it may not transgress the bounds upon one's freedom of speech and infringe upon the guarantees of Section 7.[9] It is argued that two parts of the speech were unlawfully coercive.

First, Charging Party argues that "in the speech as written, Lundy told the employees, 'we do not want a union in this company, and *we are not going to have one*'. Telling employees that 'we are not going to have' a union is an explicit threat. What he says to the employees, in this context, is that Lundy would do *whatever was necessary* to assure that he was 'not going to have' a union. The addition of the statement in another sentence concerning using 'legal' means to keep the Union out adds no gloss of innocence."[10] Language very close to that complained of here was found unlawfully coercive in *Kellwood*.[11] Lundy's remark was more than a mere expression of distaste for unions or a plea against unionization but, as argued by Charging Party, was "a flat statement that the Employer

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[9] *N.L.R.B. vs Gissel Packing Co., Inc.*, 395 U.S. 575, 617-618 (1969).

[10] As stated by the court in *Wausau Steel Corporation v. N.L.R.B.*, 377 F.2d 369, 372 (C.A. 7, 1967), even where the employer "proceed[s] carefully in attempting to limit his communications to his employees to the legally permissible, his words must be judged by their likely import to his employees. . . . [O]ne who engages in 'brinksmanship' may easily overstep and tumble into the brink."

[11] *Kellwood Co.*, 175 NLRB 559 (1969), enfd. 427 F.2d 1170 (C.A. 9, 1970).

would not tolerate a union in the plant." Focusing on the question, "what did the speaker intend and the listener understand?"[12] The testimony of General Counsel's witnesses makes it abundantly clear that they understood Lundy to have threatened their job security.[13] In agreement with General Counsel and Charging Party I find that the referred to statement was unlawfully coercive.[14]

Second, it is argued that Lundy's statement concerning the nonsecrecy of union cards was coercive. This very question was considered in *N.L.R.B. v. Finesilver Manufacturing Company*, 400 F.2d 644, 646 (C.A. 5, 1968). The court there stated, "[W]e see no reason for informing employees that they might be required to testify in open court other than to let them know that the names of union adherents could be ascertained and appropriate reprisals taken." As argued by Charging Party, "if Lundy had not had the specific intent of coercing the employees, it simply would have made no sense to 'caution them' that whoever told them the cards were a secret was lying. Against what peril, and whom, was he protecting them? What Lundy intended to say to the employees, and what he did say to them, was that *he* would find out who signed the cards. And what makes that event so terrifying is that, upon finding it out, he was going to fire them, as he later made good in the case of Willard Chavis, *et. al.* There is simply no other reasonable explanation for the words as

[12] *N.L.R.B. v. Gissel Packing Co., supra.* 619.

[13] The Supreme Court has observed that the balancing of the conflicting rights of the employer to free speech and that of the employees to engage in protected activities

> must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear. [*N.L.R.B. v. Gissel Packing Co., Inc., supra.* 617.]

[14] *N.L.R.B. v. Consolidated Diesel Electric Company, Division of Condec Corporation*, 469 F. 2d 1016, 1019 (C.A. 4, 1972), cited by Respondent, is distinguished because, among other things, the court found that "the respondent was completely passive during the organization drive, making no effort whatsoever to influence its employees either for or against the union."

written. [Emphasis supplied.]" I agree with this argument and find that portion of Lundy's speech also to have been unlawfully coercive.[15]

2. The no-distribution rule

During all times material hereto the Company maintained in effect a rule which prohibited employees under the penalty of "suspension subject to discharge" from "[t]aking orders or selling any items, collection of funds, posting signs, distribution of written or printed matter of any kind on Company property without written permission." This rule would appear to contravene the well-established principle that an employer may not prohibit his employees from distributing union literature on their own time in nonworking areas of the plant unless he can show special circumstances making such rule necessary in order to maintain production or discipline.[16] This principle originates, in part, from the fact that "[t]he place of work is a place uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to the employees"[17] and "[i]n the plant the entire work force may be contacted by a relatively small number of employees with little expense."[18]

Respondent argues that "the rule in this proceeding was not unlawful for there is no evidence that it was either enacted or enforced in a discriminatory manner, and there is no evidence that it was communicated to employees in such a way as to preclude distribution at otherwise proper times. . . . Respondent's rule did not *censor* distribution, but merely sought to *regulate* it. Employees were simply required to ask permission to distribute, and to presume that permission would not have been granted for distribution at proper times and places is to presume, with no evidence, that Respondent would

[15] *Kellwood Co., supra.*

[16] *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615 (1962); *N.L.R.B. v. United Aircraft Corporation, Pratt & Whitney Aircraft Division*, 324 F.2d 128 (C.A. 2), cert. denied 376 U.S. 951 (1963).

[17] *N.L.R.B. v. Magnavox Company of Tennessee*, 415 U.S. 322, 325 (1974).

[18] *N.L.R.B. v. United Aircraft Corporation, supra*, 130.

in fact act unlawfully. The Board is not entitled to such presumption." I disagree. The rule in this case prohibits distribution of written or printed matter of any kind, which must be deemed to include distribution of union literature. As the rule applies to employees' nonworking time and is not limited to work areas, it is presumptively invalid. So long as the rule is in force there is the possibility that it will be applied against employees who may distribute union literature. The existence of such unlawful potential tends to coerce, restrain, and interfere with employees in the exercise of their Section 7 rights. Contrary to Respondent, the burden is on the employer to overcome the presumption of invalidity rather than on the General Counsel to establish that the rule would not have been unlawfully applied.[19] I find, as alleged in the complaint, that the Company has violated Section 8(a)(1) of the Act by maintaining in effect the above-quoted rule.

3. Interrogation of Ellen Raynor

The summary of the pertinent parts of the conversation between Ellen Raynor and Production Manager Clarence Kephart is based on the testimony of Raynor. Other than admitting that he met with Raynor in his office on June 6, Kephart disputed Raynor's testimony in its entirety. Kephart was corroborated by Industrial Relations Manager Charles Moritz. For reasons stated above I find Raynor was a credible witness. Kephart, who is Respondent's principal operating official, is responsible on "a day-to-day basis" for effectuating the policies and programs of the Company as they are determined by Burrows T. Lundy, Sr., and his son, which include, as stated by Lundy, the precept: "We do not want a union in this company, and we are not going to have one." Although Kephart did not describe in his testimony what he has done to counter the Union's organizational drive, it is reasonable to infer that having received hundreds of memoranda regarding the employees' union activities he has taken steps to help insure that Lundy's firm policy against having a union in the plant

[19] *Marinette Marine Corporation*, 179 NLRB 627, 629 (1969). Compare *House of Mosaics, Inc.*, 215 NLRB No. 123 (1974).

will continue, particularly as Company President Lundy warned the employees that "[W]e are going to use every legal means we can to keep any union out." Respondent argues that "it is unrealistic to believe that Kephart, a former union member and union steward, who was experienced in labor relations matters and well advised as to his legal obligations as a supervisor (Resp. Exh. No. 40; Tr. 1575-1577, 1579-1581, 1662-1663, 1669) would have interrogated, threatened or attempted otherwise to coerce Raynor after Walter Peterson, Griffin and McLamb had told him that Raynor was one of the most active union supporters in the plant (Tr. 1138-1140, 1638)." The absurd extension of this argument is that Respondent has engaged in none of the violations alleged herein as all company supervisory personnel, at least as early as May 9, were advised by company counsel of their legal obligations in connection with the Union's campaign.[20] Further, Kephart's knowledge and experience in labor relations matters while informing him of what conduct violates the law also may have prompted him to seek ways and means to skirt the law. I am not persuaded by the argument that Kephart's background and experience necessarily supports his veracity as a witness. I am of the opinion that Kephart was not a reliable witness. In various instances his testimony conflicts with the testimony of witnesses who I believe were completely truthful. In certain other instances I believe that his testimony was contrived to support Respondent's position in this proceeding and did not reflect his best memory of the events. I also question the reliability of Charles Moritz whose testimony was given hesitantly and with a lack of certainty.

Ellen Raynor was among the more active employees who supported the Union. She held organizational meetings in her home on three occasions, including one on the night of June 5. The next morning when she arrived at work Superintendent

[20] As early as December, 1970, Company President Lundy advised the employees "We will do everything we can legally to keep [a union] out." Presumably company management by then had learned what was legally permissible and what was impermissible in combating an organizational campaign.

Everett Griffin made a remark which indicated that he had heard of the union meeting at her house. About 9 a.m. that day she received a written violation allegedly for poor work. This was the second violation that she had received and it was understood by many employees that they were subject to discharge upon receiving three violations. Late that afternoon she was summoned to Kephart's office where she spoke with him alone. He made reference to the fact that she had received another violation. She countered that it was because of the Union, but Kephart denied that. Kephart then opened a tablet and showed Raynor a list of names and "wanted to know how much did I know about the mess that was going on out there" and wanted to know if she could tell him anything about the names on the list. Raynor refused. Kephart reminded her that she had been given two violations and said, "[I]f you were to help me . . . it could help you to keep your job as long as you wanted to work here."[21] Raynor nevertheless refused to cooperate with Kephart.

Upon the foregoing, I find, as alleged in the complaint, that Clarence Kephart unlawfully interrogated Ellen Raynor by asking her what role each employee on a written list had played in the Union's organizing campaign and by reason thereof the Company has violated Section 8(a)(1) of the Act.

4. Concerning McLamb and Faison

Nellie Ruth McLamb testified about a conversation she had with Superintendent Everett Griffin on April 24 which, if credited, would support the allegations in subparagraphs 7(h) and 7(i) of the complaint.[22] Griffin's version of the incident

[21] Raynor testified that Kephart mentioned that "approximately everyone in Willard Chavis' community were involved in this mess." Respondent's witness, Kill Supervisor Carl Brewington, subsequently testified that he had heard that Willard Chavis had been involved in union activities and also that "all the employees that work in the Lundy Packing Company from Garland were involved." Brewington testified that he transmitted this information to his immediate superior, Everett Griffin.

[22] The complaint has no 8(a)(1) allegation which relates to a conversation on May 20, between McLamb and Supervisor Fulton Peterson.

contradicts the incriminatory parts of McLamb's testimony. I do not credit McLamb. Her employment with the Company terminated on May 24. Thereafter, she approached Kephart several times about returning to work because she needed the job but she has not been reemployed. On July 31 she gave an affidavit to a field examiner of the Board relative to the pending charges in these proceedings in which no mention is made of her April 24 conversation with Griffin. Her explanation for the omission is that she had given Griffin her word of honor that she would not discuss the April 24 conversation with anyone. However, the subject matter is covered in a later affidavit which she furnished to an agent of the Board in November and she explained that in the interim she "had time to think more about how the company had treated me, how unfair I had been treated, and I felt like it was only right that I should go ahead and tell the Labor Board . . . ." I am of the opinion that McLamb's hostility towards the Company and her desire to assuage her sense of injury from what she believes was inconsiderate treatment by the Company has impaired her objectivity and caused her to embellish upon her recollection of events in order to present a version of what had happened in a light most damaging to the Company. I am of the opinion that McLamb's testimony is less reliable than Griffin's and therefore I shall recommend that subparagraphs 7(h) and 7(i) of the complaint be dismissed.

John Faison testified that in early May Supervisor Fulton Peterson asked him if he knew anything about the Union and he replied that he did not. This testimony was adduced in support of paragraph 7(a) of the complaint. Fulton Peterson denied having had any such conversation with Faison. I believe that Faison was a less reliable witness than Peterson. Accordingly, I do not credit the foregoing testimony and shall recommend that subparagraph 7(a) of the complaint be dismissed.

5. Impression of surveillance

Ellen Raynor testified that a union meeting was held at her home on June 5 and the next morning, as she passed

Superintendent Everett Griffin on her way to work, he remarked, "I didn't have to invite him to my party."[23] Ules Jackson testified that he had made arrangements for the Union to hold meetings at the Royal Garden Club in Warsaw, North Carolina, where he worked on weekends. In mid-June, while Jackson was at work at the boning table, Supervisor Fulton Peterson asked Jackson why Jackson had not invited him to some of the parties which were being held in Warsaw on Tuesday nights. Jaskson replied that he didn't know what Peterson was talking about. As he left Peterson responded, "I have heard about it."[24] According to Jackson, about 2 days later, Night Shipping Supervisor Randell Penny[25] came to Jackson's work station at the boning table and asked Jackson why Jackson had not invited him to some of the parties that were being held in Warsaw on Tuesday nights.[26] Jackson replied that the door was open and that Penny could come anytime. Jackson further testified that that was the first time he had had any conversation with Penny.[27]

[23] Griffin denied that he made this remark. However, I credit Raynor who I believe was the more credible witness.

[24] I credit Jackson despite Peterson's denial.

[25] The name "Penny" is misspelled in the transcript of the record as "Penning." The transcript of the record is hereby ordered corrected to reflect the correct spelling of the name "Penny."

[26] Jackson's specific testimony was, "Why I didn't invite him to some of those parties, or union meetings that we was having in Warsaw on a Tuesday night." I construe the phrase "or union meetings" to have been an interpolation by Jackson rather than part of Penny's remark.

[27] Penny's version of the conversation would indicate that Penny was unaware that union meetings were being held in Warsaw. According to Penny he said, "Ules, I understand that you have got a club around Warsaw, and I was talking to Brother King a while ago, and he said that he had went over to your club, and . . . I was thinking on going over and checking that out one weekend . . . he feels so bad, I don't think I want to go over there, it made him feel bad." Penny testified that he was "just kidding around" with Jackson. Respondent argues that inasmuch as Penny is no longer in Respondent's employ and thus has no interest in the outcome of these proceedings he should be credited over Jackson. However, Penny's testimony, in part, was self-contradictory and in other parts reflected an uncertainty of memory. Despite the fact that he is no longer in the Company's employ, I am of the opinion that his testimony was less reliable than Jackson's. I credit Jackson as to what was said in the conversation with Penny.

Although Griffin, Peterson, and Penny spoke of a party or parties, Raynor and Jackson understood that the references were to the union meetings which had been held because there had been no employee social functions at the times referred to. The supervisors' comments, which indicated to Raynor that Griffin knew of the union meeting which was held in her home and indicated to Jackson that Peterson and Penny were aware of the union meetings which were being held at the Royal Garden Club in Warsaw, suggested to the employees that company management was keeping the union meetings under surveillance.

Respondent contends that the testimony of Raynor and Jackson, even if credited, does not establish a violation of the Act because the remarks were made in a friendly and casual manner, in familiar and informal surroundings, and the remarks were isolated and too ambiguous to be coercive. I find no merit to this argument. Despite the supervisors' use of the term "party" Raynor and Jackson understood that the references were to union meetings and not to social affairs. The comments attributed to Supervisors Griffin, Peterson, and Penny, in context of the Company's often expressed opposition to the organization of its employees and the Company's other unfair labor practices found herein, were not of such an isolated nature as to be deemed not coercive.[28] Also, even if the remarks had been made in a friendly and casual manner, the reasonable construction placed upon these comments by the employees was that the union meetings were under surveillance by company personnel and the threat inherent in such conduct was to be taken seriously.[29]

"Few propositions are more firmly embedded in the law of labor relations than that an employer who spies upon the

[28] *Truck Drivers, Oil Drivers, Filling Station and Platform Workers Local No. 705 of the International Brotherhood of Teamsters v. N.L.R.B.*, 509 F.2d 425, (C.A.D.C., 1974); *United Papermakers and Paperworkers, Local No. 321, AFL-CIO (Philip Carey Mfg. Company)*, 159 NLRB 193, 197 (1966).

[29] *See Safeway Cabs, Inc.*, 146 NLRB 1334, 1335 (1964); *N.L.R.B. v. Marval Poultry Company, Inc.*, 292 F.2d 454 (C.A. 4, 1961).

union activities of his employees engages in a flagrant violation of the rights guaranteed by Section 7 of the Act. Such conduct has been condemned by the Board and the courts since the early days of the Act, for experience has shown that employers resort to labor espionage or surveillance for the purpose of obstructing and destroying employees' self-organizational rights and activities. [Footnotes omitted.]"[30] As observed by the court in *Hendrix*,[31] "Surveillance becomes illegal because it indicates an employer's opposition to unionization, and the furtive nature of the snooping tends to demonstrate spectacularly the state of the employer's anxiety. From this the law reasons that when the employer either engages in surveillance or takes steps leading his employees to think it is going on, they are under the threat of economic coercion, retaliation, etc." Thus, regardless of whether the employer may in fact have engaged in surveillance, employees' rights are subject to the same interference when the employer creates the impression through his statements that the employees' union activities are being scrutinized. Such conduct tends to curtail employees' lawful participation in union activities by indicating that the employer is anxious to find out about union activity which the employees wish to conceal from him to avoid retaliation.[32] Accordingly, I find, as alleged in the complaint, that by creating the impression that union meetings were under company surveillance Respondent has violated Section 8(a)(1).

E. *The Discharges*

1. Willard Chavis

Willard Chavis was hired by the Company on December 2, 1965, and was discharged almost 9 years later on May 24, 1974. He worked as a loin puller for 7½ years and, until the final month of his employment, was considered very good at

[30] *Wallace Press, Inc.*, 146 NLRB 1236, 1238 (1964).
[31] *Hendrix Manufacturing Company, Inc. v. N.L.R.B.*, 321 F. 2d 100, 104, fn. 7 (C.A. 5, 1963).
[32] *Kingwood Mining Company*, 166 NLRB 957, 959 (1967), enfd. 404 F.2d 348 (C.A. 4, 1968).

that job. Thus, the last annual Employee Progress Report, dated October 24, 1973, filled out for Chavis by his foreman, Franklin Knowles, which rates the employee as either poor, average, good, or very good for eight specified characteristics, rated Chavis very good for ability, production, and quality; good for attitude, appearance, and dependability; and average for attendance and conduct. The question "Is this person a good Company employee?" was answered, "Yes," with the explanation, "His movements are good, and he shows a desire to do his work well, and he is doing a good job pulling and scribing loins." The Employee Progress Report for the prior year, dated October 26, 1972, rates Chavis good for all categories other than for production for which he is rated very good. Again the report stated that he is a good company employee and "he is active and is a good loin puller."

Chavis was the first of the Company's employees who was enlisted to help the Union in its effort to organize the Lundy Packing Company. Chavis successfully solicited about 75 employees to sign union authorization cards. He contacted the employees at their homes and at other places, including at the plant before and after work hours. He also regularly attended the union meetings and passed information to other employees about the meetings and related subjects. As far as he knew, no supervisor had observed him or had overheard him discuss union matters. However, Chavis' union activities came to the attention of plant management. Kill Supervisor Carl Brewington testified that he had heard that Willard Chavis was involved in union activities sometime before Chavis was discharged and also had heard that Chavis had accompanied a union representative to an employee's home. In accordance with the policy described above, Brewington reported the knowledge he obtained about employees' union activities, including Chavis' union activities, to his superior, Everett Griffin. Kill Division Superintendent Everett Griffin testified that he had heard about Chavis' union activities and fixed the date that he heard about them as May 14, 1974, "the

day after I got over on the Cut."[33] Respondent thus acknowledges that no later than May 14 it had knowledge of Chavis' union activities. As Respondent had in effect a long-established policy requiring all supervisory personnel to report everything they heard about union activities up the management hierarchical line, it is not unreasonable to infer that the Company learned of Chavis' union activities prior to May 14.

It is Respondent's position that Chavis was discharged because of poor performance as a loin puller on three separate days, May 6, 21, and 24. A loin puller using both hands draws a specially constructed semicircular knife with two handles through the loin of the hog to separate the fat from the lean meat. The pull must be precise. Removing too little fat reduces the value of the fatback and requires more extensive trimming of the loin. Removing too much fat damages the loin by cutting through a protective membrane and exposing the lean meat. Exposed lean meat deteriorates quickly. Whenever any lean meat on the loin is exposed it is referred to as a "score." If the score is small it is considered minor and the loin still will be passed as first quality. However, if the score is large then the loin is considered a miscut and becomes a loin of lesser quality for which the Company will be paid less than its premium price. The loin pullers are required to keep pace with the speed of the chain which carries the loins along the cut table. A loin puller pulls 3,960 loins during a normal 9-hour shift, or 440 loins per hour, or 8 loins per minute, or one

[33] The reference is to the period when Griffin substituted for Glenn Clark while Clark was absent from work because of a broken ankle. The gist of Griffin's testimony is that he first heard about Chavis' union activities when he began supervising the cut floor. This would appear to be a rationalization after the event. Brewington was the supervisor in the kill department, which was headed by Griffin. Brewington testified that he reported to Griffin what he had heard about Chavis' union activities. This report could have been made before Griffin began to substitute for Clark, and while Griffin was working full time in the kill division. Thus, there is no relationship between the report made by Brewington to Griffin and the fact that sometime between May 11 and 14 Griffin began to substitute for Clark in the cut department. I am of the opinion that Griffin's testimony precisely fixing May 14 as the day that he heard about Chavis' union activities is unreliable.

loin every 7.5 seconds. Loin pulling is a highly skilled task because the job requires precision, dexterity, and speed and because at the same time the loin puller cannot see where his knife is cutting. Thus, Benjamin J. Price, who was called by Respondent as an expert witness, testified that a loin puller must have a sense of rhythm and synchronization and that some people can never learn to do a satisfactory job as loin puller.[34] During the course of a day a loin puller cannot help scoring some loins and sometimes, according to Franklin Knowles, it may not be his fault. The consensus of the witnesses is that even the very best loin pullers can be expected to score a certain number of loins during a day. Chavis testified that on the average he scored 3 to 4 loins per hour or from 27 to 36 per day. Knowles estimated that 45 scores per day would be considered normal performance. Griffin's estimate was 27 per day, and Clark's was 20 to 25 per day. There is no pattern or frequency to the scoring of loins. Sometimes a loin puller will score none in an hour and sometimes he will score several in a relatively short time. "It just depends on how the man's knife slips." Factors such as whether the hogs are too cold or how the loins are scribed can affect the number of loins that a puller may score. Also, if the loin puller's knife is dull it could cause him to score loins. Franklin Knowles testified that, although a certain amount of human error is expected, nevertheless, in accordance with company policy, "we had to get onto the people about miscutting the meat."[35]

On May 6, Willard Chavis was given a major violation for defective workmanship because allegedly he had scored an excessive number of loins. The Company's plant rules provide for two categories of violations. For a violation of rules 1 to 16 the penalties range from a warning slip for the first offense to 5 days of reduced pay for the fifth offense and suspension subject to discharge for the sixth offense. For a

[34] Everett Griffin testified to the same effect.

[35] Franklin Knowles also testified that when he was foreman in the cut department he gave employees violations and had taken away incentive pay because of excessive miscuts of loins. However, these forms of disciplinary action were not considered the same as major violations.

violation of rules 17 to 43, which are referred to as major violations, the penalty for the first offense is suspension subject to discharge. Rule 25 relates to "defective workmanship or intentional slowing down of production or work." Although violations of this rule have been given to employees, the May 6 violation given to Chavis, according to Chavis and according to Cut Supervisor Franklin Knowles, who had worked for the Company for 16½ years prior to leaving its employ on May 10 and who had been foreman in the cut division during his last 9 years of employment, was the first major violation ever given to a loin puller for scoring loins.

Production Manager Clarence Kephart directed that the violation should be given to Chavis on May 6. According to Kephart, in the afternoon on that day he went into the cut department and as he walked towards the loin table he noticed that Chavis had scored three loins. As he approached Chavis he noticed Chavis score a fourth loin. Kephart called Chavis' attention to the four loins that he had scored and said to him, "Now you can do better than that. You are just not paying attention to business." Kephart moved away from the loin table and became engaged in a conversation with Plant Manager Walter Peterson. Kephart then observed Chavis score three more loins. Kephart called Supervisor Franklin Knowles and Superintendent Glenn Clark. He asked Knowles what was the matter with Chavis and Knowles replied, "I don't know. I warned him about the same thing twice this morning." Kephart told Knowles to warn Chavis again. Knowles went to speak with Chavis and as Knowles turned away from Chavis the latter scored another loin. At this point Kephart told Clark to "get that man off the job, talk to him, and give him a violation for defective workmanship, that I just wasn't going to have [that kind of] work going on there." In general, Kephart's version of what happened was corroborated by Walter Peterson and Glenn Clark, although Clark testified that before Kephart had called him he had been near the loin table for 10 or 15 minutes, had been able to observe the loin

pulling operation, and had observed Chavis score only one loin.[36]

On the other hand, Franklin Knowles denied that he had warned Chavis on May 6 about scoring loins.[37] The direction to give Chavis a major violation apparently struck Knowles as being unusual because Knowles asked Clark again to ask Kephart whether Kephart wanted a major violation given to Chavis. Only after Clark reaffirmed that Kephart wanted a major violation given to Chavis did Knowles cause the violation to be prepared.[38]

According to Kephart he directed that a major violation for defective workmanship be given to Chavis after he observed Chavis score a total of eight loins and after Knowles had informed him that Knowles had warned Chavis twice that morning about scoring loins. I do not find this explanation credible. First, it is noted that May 6 was a Monday and on Mondays the loins are colder and harder to pull than on other days because the hogs have been stored in a cooler over the weekend. Therefore, it is likely that more loins will be scored on Mondays than on other days. Second, Clark testified that he does not know whether Chavis scored an excessive number of loins for the entire day.[39] Third, Knowles denied, and I credit Knowles,[40] that he had warned Chavis about scoring loins on that day. Fourth, Kephart and Clark both testified that prior to May 6 Chavis had been doing a good job. In all the circumstances, it does not appear to have

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[36] Chavis testified that at the time in question on May 6 he had scored only one loin.

[37] Knowles testified, "I had not at that particular date but I had warned him before about scoring loins."

[38] Clark denied that Franklin Knowles inquired if he was sure that Kephart wanted to give Chavis a major violation.

[39] Clark further testified that he found nothing wrong with Chavis' work during the balance of that week, which was the last week Clark worked before he broke his ankle and had to remain away from work for a month.

[40] Knowles was no longer in Respondent's employ at the time he testified. There is nothing in the record to suggest any bias on Knowles' part in favor of or against the Company or Chavis. Knowles impressed me favorably as a witness. To the extent that Knowles' testimony was contradicted by Clark and Kephart, I credit Knowles.

been reasonable or normal for Kephart to have directed that Chavis be given a major violation for allegedly scoring eight loins during a relatively brief period of time on May 6 when never before had a loin puller been given a major violation for such reason.[41]

On May 21 Chavis was given a second major violation[42] pursuant to rule 25 for having scored five loins in a 10-minute period.[43] Everett Griffin was then acting as cut division superintendent in the absence of Glenn Clark. Griffin testified that from May 13, when he took charge of the cut floor, until May 21 the quality of Chavis' work had been satisfactory. According to Griffin, about 1 p.m. on May 21 he observed Chavis score four loins within a period of several minutes. Griffin motioned to Production Manager Clarence Kephart, who was then on the cut floor, to come over to him and Griffin showed Kephart the four scored loins. As they were talking, Chavis scored a fifth loin. Griffin testified that the five loins were scored within a 10-minute period. Chavis was called from the line and Griffin admonished Chavis in the presence of Kephart and Walter Peterson who had joined the other two. Griffin testified, "I told Willard that we couldn't continue to have

[41] Sam Matthews, a loin puller, and Arthur Boykin, a loin saddler, testified that the quality of Chavis' work declined in 1974. According to Matthews, the quality of Chavis' work began to fall after May 6 and, according to Boykin, there was an unspecified date when Chavis began to score more loins than usual and during the month of May Chavis was scoring 50 loins to as many as 80 loins per day. I find the testimony of Matthews and Boykin concerning Chavis' performance valueless. Except for the specific incidents that occurred on May 6, 21, and 24, even the Company does not contend that Chavis' performance was bad in 1974. Neither Matthews nor Boykin indicated any valid bases for the sweeping judgments they made. Furthermore, there is no evidence that Matthews or Boykin relayed his view to company management.

[42] On May 16 Chavis and Roy Gene Wilson were given minor violations for having engaged in horseplay. However, these violations were not factors in the discharge of either employee.

[43] Unlike the May 6 incident where Chavis denied that he had scored eight loins as he was accused of doing (Chavis testified he had scored only one loin during the time in question), Chavis admitted with respect to the May 21 incident that he had scored four loins, although he was uncertain as to the time interval that was involved.

this type of quality work, and that I would have to give him a major violation."

Griffin testified that prior to this incident he had received no complaint from Supervisor Fulton Peterson about Chavis and insofar as he knew Chavis' work was satisfactory for the rest of that day, May 21. Griffin's only explanation for giving Chavis a major violation for scoring only five loins was, "He had never had this frequency before [five scored loins within 10 minutes] but the rest of that day, he did score loins afterwards but not with the frequency because if he had scored the same frequency he had then, sir, I would have given him another violation." Griffin further testified that he did not observe any unsatisfactory work on the part of Chavis during the next 2 succeeding days, May 22 and 23. Walter Peterson generally corroborated Griffin. In addition he testified, "I asked Willard what was wrong, that he was supposed to do a better job than that. And Willard said that he knew that Mr. Griffin was there and that he didn't know what was wrong. And Mr. Kephart told Willard that it looked to him like he was scoring loins on purpose."[44]

The next day, May 22, Kephart read to Chavis, and also gave him a copy of, a temporary reduced pay notice. The notice informed Chavis that 50 cents per hour was being deducted from his pay for the first five full scheduled days of work beginning on May 27 because of the violations of plant rules on May 6 and 21. Under remarks the notice states, "Any further violation of this type or any other major rule violations will result in immediate discharge."

On May 24 Chavis was given a third major violation for having scored five loins in a 15-minute period. Griffin testified that about 7:30 a.m. he observed Chavis score the loins. Griffin removed Chavis from the loin line and telephoned Walter Peterson to advise Peterson that he was giving Chavis a major violation. Griffin knew that such action on his part would result in Chavis' discharge. Both Walter Peterson and Clarence Kephart came to the cut floor. Kephart reminded

[44] The testimony of Fulton Peterson and Clarance Kephart generally corroborate Griffin's testimony as to the May 21 incident.

Chavis that he had been informed that he would be discharged for another major violation and told him to get his gear and to leave.[45]

The principles applicable to the discharge of Chavis are well settled. If a motivating reason for his discharge was his union activities, then the Company violated the Act. On the other hand, union activities do not shield an employee from discipline. Also, the reasons for a discharge, no matter how outrageous, do not constitute a violation of the Act if there has been no infringement of employees' statutory rights. This does not mean that the reasons ascribed for a discharge are not subject to scrutiny. An employer who would use illicit means to forestall an organizational drive normally would seek to conceal his unlawful activities. A powerful weapon in combating union organization is the discharge of employees, particularly leaders in the union movement, because a threat then hangs over the remaining employees that if they support the union they also will be subject to dismissal from their jobs. Such threat is a forceful constraint on the exercise by employees of their statutory right to engage in self-organizational activities. The fears generated in employees by the discharge of co-workers are pervasive, difficult to extinguish, and quick to reappear under only slight stimulus. Thus, as has been often observed, when the reason given for the discharge of an active union proponent by a hostile employer appears to be unreasonable, imprudent, or unusual, the question which must be answered is whether the ascribed reason is merely a sham or a pretext to conceal another, but unlawful, reason.

If Chavis' union activities had nothing whatsoever to do with his discharge, his discharge was lawful no matter how unreasonable the Company may have acted. However, I find that was not the case. The Company's hostility towards the

[45] There was considerable testimony adduced as to what happened in the early morning on May 24 and what was said among the various participants to the incident. To summarize that evidence and to resolve the various conflicts in the testimony would not make this Decision any more meaningful. Of necessity, because of the length of the transcript of record and the volume of exhibits, I must omit discussing much of the evidence adduced at the hearing or this Decision would become unduly long.

organization of its employees was firm, regularly repeated, and implacable. On May 8 President Lundy told his employees, "We do not want a union in this company, and we are not going to have one." Accordingly, when Chavis, an employee leader in the Union's organizational drive, was discharged because he was given major violations for defective workmanship on May 6, 21, and 24 when for 7½ years prior thereto he had never received a major violation for defective workmanship – and no other loin puller for that matter had ever been given a major violation for defective workmanship – the ascribed reasons must be scrutinized.

Chavis was accused of scoring eight loins on May 6 within a short period, five loins on May 21 within a 10-minute period, and five loins on May 24 within a 15-minute period. Was this the reason for Chavis' discharge as Respondent contends? Chavis pulled approximately 3,960 loins per day. In the 14 workdays between May 6 and 21 he pulled approximately 55,440 loins. He was fired for scoring 18 loins.[46] What explanation does Respondent offer for this seemingly unwarrantable action? Production Manager Kephart testified that for any major violation an employee is subject to discharge. In the case of Willard Chavis, he decided that Chavis would be discharged for three major violations. In reaching such decision he was not following any particular policy. Kephart testified that the reason for his decision to discharge Chavis for a third major violation was "[o]n the basis of the frequency of [the] necessary disciplinary action to get him, to try to get him to do the job right." There is no rationale to this explanation. Also unexplained by Kephart is why, in the first instance, Chavis' alleged offenses merited giving him any major violations. Walter Peterson attempted to answer this question. Peterson testified, "Well, I figure that if I were to see five [scores] in ten minutes time during the time that I watched, this was what I was saying about quality control. We would check out the rest of the day; if it was on this continued basis, how many

[46] It is recognized that the total number of loins that Chavis scored in these 14 days was probably in the normal range of about 280 to 420.

scored loins you would have per hour per day." On cross-examination, he was asked:

> Q. (By Mr. King) Let me ask you just a few questions about this projection that you talked about the last time that you were asked some questions [by] your lawyer over there; is what you are saying that you would see a certain number of defects in a given period, and you would multiply that out and project that over a full day's production?
>
> A. This is the way quality control –
>
> Q. I'm asking you if that is what you do?
>
> A. Well, this is the way in my mind, yes, that I worked.
>
> Q. I asked you specifically, is that the way you do it?
>
> A. This is the way I project it, yes.

Such projection in an operation such as loin pulling is completely unworkable and unreasonable.

The reasons given by Respondent for Chavis' discharge do not ring true. No acceptable basis was established for having given him any of the three major violations for alleged defective workmanship and the aggregate of his allegedly poor performance is absurdly miniscule. Absent a satisfactory reason for having discharged Chavis, in the circumstances, I find, as alleged in the complaint, that Chavis was discharged because of his union activities. As such discharge discourages membership in the Union, Respondent thereby violated Section 8(a)(3) of the Act. I further find that by such conduct Respondent also has interfered with, restrained, and coerced employees in the exercise of their self-organization rights guaranteed in Section 7 of the Act thereby violating Section 8(a)(1).

2. Roy Gene Wilson

Roy Gene Wilson was hired on March 31, 1969, and was discharged on June 18, 1974. He signed a union authorization card at Chavis' home on the night of May 7. Shortly thereafter he successfully solicited two employees to sign authorization cards for the Union and on five occasions he accompanied Union Representative Elsie Hales or James Lawrence to employees' homes. Also, Wilson regularly attended the union meetings. Cut Division Superintendent Glenn Clark testified, "I heard that [Wilson] was for [the Union] when I was out, injured." The period referred to was from May 11 to June 10. Thus, admittedly the Company knew about Wilson's union sympathies prior to June 10.

For 5 years until May 24, Wilson worked as a loin scriber. He was considered very good at the job. In addition, in 1970 he began to learn how to pull loins and from time to time substituted for the regular loin pullers.[47] The last Employee Progress Report prepared for Wilson, which is dated October 1973, rates him very good for ability, attitude, production, quality, and dependability and rates him good for attendance, conduct, and appearance. The report states that Wilson is a good company employee and explains, "He is a good worker, and needs very little coaching, therefore I think he is a good loin scriber, and loin puller." Wilson replaced Chavis when the latter was discharged on May 24. Wilson testified that he

[47] For 2 weeks in April Wilson substituted as a loin puller for Sam Matthews when the latter was absent because of illness. Glenn Clark testified that he observed Wilson pulling loins during this period and Wilson did a good job.

then considered himself a qualified loin puller.[48]

Wilson's rate of pay was not changed when he replaced Chavis. He was not given the higher loin puller's rate but was continued at the rate for a scriber. Respondent offered no evidence as to whether on May 24 a decision had been made to advance Wilson permanently to the position of loin puller or whether the appointment was temporary until somebody more qualified could be found to do the job or until he was able to demonstrate his ability to perform the job of loin puller on a sustained basis.

Almost immediately after Wilson began to pull loins his

[48] Wilson testified that about 9 a.m. on May 24, shortly after he replaced Chavis in the loin puller's position, he overheard a conversation between Supervisors Fulton Peterson and Jessie Spell, who were standing about 7 feet from him. Spell spoke in a loud voice so that Wilson had no difficulty hearing him. According to Wilson, Spell told Fulton Peterson that Wilson "was in this thing with Willard" and Peterson responded, "Yes, and we are going to have to get rid of him." Charlie Edward Oates corroborated Wilson and testified that he heard Spell tell Peterson that Spell "believed Roy Gene was in with Willard." Oates reaffirmed this testimony on his redirect examination. However when examined by Respondent's counsel, Oates testified that he did not recall Wilson's name being used in the conversation and he did not recall the statement made, "Yes, we will have to get rid of him." Jessie Spell denied making the alleged statement and testified that as of May 24 he had not heard that Wilson was active in the Union. Fulton Peterson also denied that the conversation described by Wilson took place. Arthur Boykin, who worked close to Wilson and Oates, testified that he did not hear the conversation described by Wilson. Similarly, Sam Matthews, who then worked alongside Wilson, denied that he heard any such conversation. Oates was a nervous and uncertain witness. While I believe he did not consciously testify falsely, I find that his testimony, which in part was self-contradictory and which only in part corroborated Wilson, was unreliable. Wilson was a combative witness. There was a seeming ardor and embellishment to his testimony which probably reflected his indignation and anger at what he believes to have been unfair treatment by the Company. I suspect that his memory of the events about which he was questioned was not precise and objective but was affected by the intensity of his feelings in the matter. I am of the opinion that Wilson was not an entirely reliable witness. I do not credit Wilson's testimony in regard to the conversation he allegedly overheard between Spell and Peterson on May 24.

supervisors began to find fault with his work.[49] Everett Griffin who was then substituting for Clark as superintendent of the cut department testified about a series of complaints he had with respect to Wilson's performance:

In the morning on Tuesday, May 28, Griffin orally warned Wilson, who had scored four loins in 8 or 9 minutes, that "he was pulling an excessive amount of scored loins, and that he was going to have to do a better job, and that he was going to have to improve."

The next morning, May 29, Griffin observed Wilson score between 7 and 10 loins in less than 10 minutes. Griffin again warned Wilson that he was going to have to do a better job. He asked Wilson what was the matter and Wilson complained that his knives were dull. Griffin then instructed Supervisor Fulton Peterson to sharpen a knife for Wilson. After Peterson returned the sharpened knife to Wilson his work did not improve and he complained to Griffin that the knife was no better than the others that he had been using. Griffin then reprimanded Wilson for not having sharpened his own knives.[50] Wilson then informed Griffin that he did not know how to sharpen the knives. Griffin reported that to Kephart, who instructed Griffin to have Ules Jackson show Wilson how to sharpen a loin knife. Kephart testified that while Jackson was demonstrating the sharpening process to Wilson the latter appeared to be inattentive. There was testimony which indicates that it requires a considerable period of time to learn how to sharpen a loin knife. Sam Matthews testified that it takes about a month, while Ules Jackson testified that it takes 8 or 9 months. Wilson testified that he never learned how to

[49] Wilson replaced Chavis on Friday, May 24. Monday was Decoration Day. The record does not indicate whether the Company observed that day as a legal holiday. Thus, Tuesday, May 28, was either the first or second workday after Wilson was designated to replace Chavis.

[50] Loin pullers are given 6 minutes' pay each day to compensate them for the time required to sharpen their knives. They are supposed to sharpen their knives before beginning work in the morning or during breaks.

sharpen a loin knife.[51]

In the afternoon on May 30 Griffin noticed that Wilson miscut three or four loins in less than 10 minutes. At the next break Griffin spoke to Wilson in the superintendent's office and told Wilson that "he was not paying any attention to the loin pulling, that he did not have no interest as to quality and that I observed that he had a poor attitude." Griffin also told Wilson that he should have learned how to sharpen knives during the time he was learning how to pull loins. According to Griffin, "I did tell him that I knew that he could do the job right because he had done it in the past. I told Roy Wilson that I was putting him on notice right now that we expected quality workmanship and attitude, and that a man had to keep his mind on what he was doing, and have a desire to do quality work if he was going to." Griffin then asked Wilson if he had any questions. Wilson responded, "Well, you have got all the questions, and you have got all the answers." Before Wilson left the office Wilson said that he would try harder.

On Monday, June 3, about 10:40 a.m. Everett Griffin observed Wilson score four loins in 14 minutes. Griffin instructed Supervisor Fulton Peterson to show Wilson the scored loins and to inform Wilson that he would be taken off incentive until such time as he could consistently pull quality

[51] Wilson testified that when he substituted for Sam Matthews in April Willard Chavis sharpened the knives for him. To maintain a sharp edge on the knife, after every few pulls, the loin puller is required to hone the knife on a specially constructed length of steel. At one point in his testimony Wilson testified that he was "pretty good" at steeling a knife, but at a later point he testified that he couldn't keep his knives sharp because "I couldn't steel it."

loins.[52] A "no incentive pay" slip was prepared by Supervisor Fulton Peterson and countersigned by Wilson which states, "The above employee is hereby notified that he or she shall not receive incentive pay starting 6/3/74 for the following reason: Employee scored four loins in a period of fourteen minutes."[53] Griffin testified that during the meal break that day, June 3, Wilson came into the superintendent's office where Walter Peterson also was present. Wilson asked Griffin why Griffin was picking on him because he thought he was doing better. Griffin denied that he was picking on him. Wilson asked why he was being taken off incentive and Griffin replied that Lundy cannot continue to give premium pay for less than premium quality work. Wilson responded that he needed all the money he could earn and asked Griffin to give

[52] Under the Company's wage system an employee's rate is the sum of two components. One is the base rate for the job and the other is the incentive rate. A new employee after he has demonstrated that he is able to perform his job satisfactorily receives an increase which is referred to as the incentive rate. As a form of discipline, the Company may deduct the incentive pay from an employee's wages for a specified or an indefinite period of time. In the case of Wilson, as of June 3 he was receiving the scriber's rate, not the loin puller's rate. When the incentive component of his rate was removed on June 3 Wilson was then being paid less than he had been receiving as a scriber, although he was working at the higher rated job of loin puller.

[53] Wilson testified that on June 1 Peterson informed him they were taking away his incentive pay for 1 day. Wilson said that he was doing just as good a job as he had done before and Peterson responded, "he knew that I was doing a good job but he didn't know what they wanted." Peterson contradicted Wilson and testified that he informed Wilson that Wilson was being "taken off incentive indefinitely or until he could pick back up and do the proper job." As June 1 was a Saturday and as the "no incentive pay" notice is dated June 3 I find that the incident occurred on June 3 as testified to by Respondent's witnesses. The "no incentive pay" notice does not provide for any termination date. Accordingly, it does not support either version. If on June 3 Fulton Peterson had been as precise in what he said to Wilson as he was in his testimony at the hearing, then it would seem that he would have included in the "no incentive pay" notice the statement that the deduction was for an indefinite period. Regardless of what Fulton Peterson said to Wilson, it is clear from the evidence, and I so find, that Wilson understood that he was being taken off incentive pay for 1 day only.

him another chance as he was just beginning to learn how to sharpen his knife.[54]

Griffin had no further complaints about Wilson's work. On June 10 Glenn Clark returned to work and Griffin was relieved of supervision of the cut department. Griffin informed Clark that W lson had been taken off incentive pay and that Clark could estore Wilson's incentive pay whenever Clark felt he should. The next day, June 11, Wilson asked Clark when he was going to receive loin puller's pay. Clark answered that Wilson would receive it when he was satisfied that Wilson could pull quality loins consistently. Wilson asked how he was doing and Clark replied that he was back only 1 day and it was too early for him to make a decision. Clark then showed Wilson some loins that had been pulled too fat and told Wilson that fat was worth a lot more on the fatback than it was going into the lard.[55]

At the end of the workday on June 13, as Wilson was leaving the plant, Clark called him into the superintendent's office where Griffin was also present and informed Wilson that it was his, Clark's, decision when Wilson would get loin puller's pay and that Clark did not have to check with anybody about the subject.[56] Then, according to Clark, "I told him that it should not be too long because he had been pulling loins a right good while; and he said that he was going to do the best he could; and I told him that when I was satisfied that he

[54] Walter Peterson corroborated Griffin regarding the aforesaid conversation. No attempt was made by either witness to explain what Wilson meant by asking Griffin to give him another chance. Nothing that had transpired to that date, June 3, would have suggested to Wilson that the Company was considering discharging him. A reasonable inference is that Wilson was concerned that he might be returned to the scriber's job and thus be denied the opportunity of earning more money as a loin puller. I do not credit Wilson's denial that he had any conversation with Griffin on June 3 about being taken off incentive pay.

[55] That afternoon Clark observed Wilson score two loins which meant that he took off too much fat and had cut into the lean meat.

[56] According to Clark, earlier that day Wilson had asked him whether he had checked on when Wilson would get loin puller's pay.

could pull loins of quality and be consistent that he would get loin puller's pay."[57]

On Friday, June 14, when Wilson received his paycheck he discovered that incentive pay had been deducted for 2 weeks. About 4:30 p.m. Wilson, in an agitated state, went to the superintendent's office where he encountered Griffin. He complained that Fulton Peterson had previously told him that he would lose incentive pay for only 1 day. Griffin replied that he had instructed Fulton Peterson to tell Wilson that he would be off incentive until he could consistently pull quality loins. The two went into another office where Fulton Peterson was sitting. Peterson confirmed that he had followed Griffin's instruction to which Wilson responded, "That is a damn lie." Peterson replied, "You are a damn liar. I hope you die and go to hell." Griffin tried to calm down both men. About that time Glenn Clark walked into the office and Griffin left. According to Wilson, he asked Clark when his incentive pay was going to be restored and Clark responded, whenever they got ready.[58]

Glenn Clark testified to the following instances when Wilson was cautioned about scoring loins:

[57] Everett Griffin's recollection of the conversation differs in some respects from Clark's.

[58] Clark did not testify to such effect.

date	Number of Scored Loins
6/11 p.m.	2
6/12 a.m.	2
6/12 p.m.	3
6/13 a.m.	9
6/13 p.m.	2
6/13 p.m.	2
6/14 a.m.	2
6/17	some loins [59]

On Monday, June 17, Wilson was given a major violation for placing his "steel" on the loin table.[60] The rule recently had been adopted because an employee's steel accidently had been picked up from a table with a load of fat and had caused the breakdown of a lard machine. Wilson was accused of using profanity towards Supervisor Fulton Peterson when the latter advised him that he was being given the violation. That evening when Wilson appeared at the supervisor's office to sign the employee warning notice he engaged in an angry exchange with Griffin and Fulton Peterson. Before Wilson left the office, according to Clark, "I told him that he was doing a poor job. . . . [H]e was scoring too many loins; I told him we took him off incentive pay; and he just didn't get any better, and

[59] Charging Party in its brief points out: "The table demonstrates that Clark's claim is that on the four consecutive workdays in the period of June 12-17, he caused Wilson to be given five oral warnings, and one instruction and one inquiry, for a total of seven separate approaches, all for scoring a maximum count of 20 loins. During that 4-day period, again assuming a normal 9-hour shift, Wilson again pulled 15,840 loins and was given seven warnings and instructions for scoring a maximum of 20 loins out of that 15,840."

For reasons stated above, I find the testimony of Sam Matthews and Arthur Boykin, concerning the number of loins that Wilson scored, of no value.

[60] A "steel" is a tool used for honing loin pullers' knives.

I told him that I thought it was on account of his poor attitude."[61]

Wilson was discharged on June 18. Wilson's version and Respondent's version of what happened differ materially. While I believe there was exaggeration on both sides, I am of the opinion that the version given by Wilson was less accurate than the version given by Respondent's witnesses. According to Wilson, in the morning on June 18 he was given a major violation for defective workmanship because he had scored five or six loins. He was discharged that afternoon because allegedly he had scored five or six more loins. When he was advised by Glenn Clark that he was being discharged, Clark also informed him that "Kephart had told [Clark] that [Wilson] was working for the union and they had to get rid of [Wilson]." Wilson further testified that while he was gathering his things together in the locker room he remarked to Foreman Jimmy Thornton that he had been discharged because he was working for the Union and Thornton replied, "Well, they are liable to try anything out here."[62]

Glenn Clark testified that about 11 a.m. on June 18 he observed Wilson score 28 loins in 25 minutes. He informed Kephart that he was going to give Wilson a violation for defective work. When Wilson returned from lunch, Clark showed him the scored loins, which had been placed aside, and asked Wilson whether he had any explanation. Wilson replied that he was doing his best. Clark brought Wilson to the office where he was given an employee warning notice for defective workmanship. In the presence of Walter Peterson, Clark said that the Company cannot tolerate 28 scored loins in 25 minutes and told Wilson he was not doing his best. Wilson replied, "You all are always on my back, and I am doing a good job."

[61] Clark did not explain why he considered the quality of Wilson's work as poor. In the period between June 10 and 17 Clark had observed Wilson score a total of approximately 22 loins. That alone would not indicate poor quality because even Clark testified that it was normal for a loin puller to score 20 to 25 loins per day. As testified to by Knowles, it was the practice to caution loin pullers about scoring loins even though the total of their daily scores was not excessive.

[62] Thornton denied making such remark.

Walter Peterson interrupted with a comment, "Roy, if you are doing a good job, why would we be on your back all the time?" Wilson responded, "I don't know unless it is because the union is trying to get in." Before Wilson left the office Clark warned him that if he continued to score an excessive number of loins that afternoon he was going to be discharged. That afternoon Clark observed Wilson badly score 18 loins in a period of 20 minutes. Clark had Wilson removed from the loin line and informed him that he was discharged.

Why was Roy Gene Wilson discharged on June 18? The most comprehensive explanation offered by the Company appears on its Pay Roll Change Notice of June 18 as follows:

> Employee's job was that of a loin puller, his work was not satisfactory, scored excessive amount of loins. He was taken off incentive pay on 6/3/74. His work and attitude toward his job continued to be poor. On the morning of 6/17/74 it was necessary to issue Wilson a rule violation for insubordination. On 6/18/74 in the A.M. employee was noted by Superintendent Glenn Clark scoring loins excessively (28 in 25 minutes). Wilson was given a rule violation for defective workmanship and told that if he continued to score loins excessively he would be discharged. At approximately 3:35 P.M. 6/18/74 he again began to score loins excessively (18 in 20 minutes) and was therefore discharged.[63]

When Wilson was designated to replace Chavis, it soon became clear that he was not fully qualified as a loin puller. Essential to the performance of the job is the ability to sharpen loin knives and to keep a honed edge on the knives. Wilson had not acquired these skills. Both Griffin and Clark, the successive superintendents of the cut division between May 24 and June 18, testified that they were of the opinion that Wilson's workmanship was unsatisfactory. From almost the very first day in May that Wilson began to pull loins, his performance was criticized. What is surprising is not how

[63] Insubordination refers to the violation given to Wilson on June 17 for placing his steel on the loin table.

many loins Wilson scored but, except for June 18, the relatively small number of loins that he scored on each occasion for which he was criticized. No adequate explanation is given as to why Wilson was retained as a loin puller if his performance was poor from the very beginning.[64] Also, there is no evidence that Wilson was actually promoted to the job of loin puller. To the contrary, his rate of pay from May 24 until the date of his discharge was unchanged. Furthermore, Clark specifically advised Wilson that he would receive the loin puller's rate when he demonstrated that he could perform the job consistently well. These facts suggest that on May 24 Wilson was not promoted to the job of loin puller but merely was being tried at the job to ascertain whether he could qualify for the position. According to Respondent, on June 18 Wilson demonstrated clearly his lack of qualification. Wilson had been a scriber for 5 years and had been rated very good in that job. The Company did not return Wilson to the job which he had demonstrated over a long period of time that he could do well. Clark testified:

> Q. (*By Mr. Carson*) Was any consideration given by you, or you in consultation with any other supervisor, to taking Roy Gene Wilson off the loin puller job and putting him back on the loin scriber's job?
>
> A. No, sir.
>
> Q. At no time?
>
> A. No, sir.
>
> Q. As far as the Company was concerned he was permanently classified as loin puller?
>
> A. No, sir.

In its brief Respondent argues: "General Counsel may contend that once Wilson's work became poor, he should

[64] The testimony of Respondent's supervisors that Wilson had performed satisfactorily in the past when he had substituted for the regular loin pullers is the reason why the Company gave him the chance to fill the position which had become vacant with the discharge of Chavis. It does not explain why Wilson was retained in the job when, according to Respondent's witnesses, he demonstrated his lack of skill.

have been transferred back to his scribe job instead of being fired (Tr. 1336). However, the record establishes that, if anything, Respondent's practice was to the contrary (Resp. Exh. No. 48(a); Tr. 1881-1883)." The exhibit referred to is a document entitled "Employee Classification Record" for Johnnie L. Faison (not the John Faison involved in this case) which, in pertinent part, reads as follows:

> 4-18-66 Employee worked in our casing room for many years. We found it necessary to close our casing room and placed this employee at another job. He was not doing the job assigned properly and when told about it, he said he could not do the job due to an injury sustained in an earlier auto accident. Work in casing department was discontinued. Employee was reassigned to snatch guts, and given ample training time (4 weeks) with help on this job. It was necessary to keep after him for not doing job properly. He would do all right for a while then not keep up and cut the product. He said if we were not satisfied with the way he was doing the job we could pay him off. The first time he said this we ignored it and tried to get him to do the job properly and keep up. However our talking did no good and when he said it a second time, we let him go.

The transcript pages referred to in Respondent's brief, in pertinent part, are as follows:

> *Mr. Petesch*: . . . At this time, I will offer Employee Classification Record on Employee Johnny L. Faison as Respondent's Exhibit 48(a), the last notation on the document is: 4-18-66; the document relates to the policy of the company to transfer employees to jobs based on the company's convenience as opposed to the employee's convenience.
>
> • • • •
>
> *Judge Silberman*: Do you object to the admission of this document?
>
> *Mr. Carson*: Yes, Your Honor, this incident related on the business record occurred in 1966, to wit: April 18th, 1966; the individual --

> • • • •
>
> *Judge Silberman*: What is the purpose of this document?
>
> *Mr. Petesch*: Your Honor, the man was, according to the document, he was not, well, I will start at the beginning: the employee worked in our casing room for many years. We found it necessary to close our casing room and place this employee in another job. He was not doing the job assigned properly, and when told about it, he said that he could not do the job due to an injury sustained in an earlier auto accident; and this employee was given the job of snatch guts, and trained on the job; but it was necessary to keep after him for not doing the job, and he did not do the job satisfactorily and was discharged. It indicates, Your Honor, that the man's dissatisfaction with the job was not important. The company transferred him where the company wanted to utilize him. It goes to that issue.
>
> *Judge Silberman*: In relation to the discharge of Wilson?
>
> *Mr. Petesch*: Wilson, that's right.
>
> *Judge Silberman*: To show that his transfer [to] and discharge from the new job without a retransfer would be in line with past practice?
>
> *Mr. Petesch*: That is correct.

Contrary to Respondent, I find that neither the portion of the record cited nor any other parts of the record evidence any policy or practice which explains why the Company gave no

consideration to returning Wilson to his former job of scriber.[65] I do not believe the explanation advanced by Respondent for Wilson's discharge.

Respondent argues:

> Even if Wilson is credited as to the extent of his union activity, the record establishes that *all* of it was carried on *away* from the plant and there is no evidence that Respondent knew of either the extent or the character of this activity. The *Rupp Forge Company, supra*. Thus, Wilson was not a leading union proponent, *Regal China Corp.*, 195 NLRB 585, at 587, 79 LRRM 1512 (1972) (Brown discharge), but was at best only one of a group of employees whose sympathies had been reported to Respondent, and his activity was not so distinctive as to cause Respondent to select him for an anti-union termination. *F. W. Woolworth, supra* (Erickson refusal to rehire). Those employees such as Raynor or organizing committee members Burgess, Underwood, Wilson and Simmons whose activities could have attracted Respondent's attention suffered no discrimination, which indicates an absence of unlawful motivation. *Abitibi Corporation*, 198

[65] I agree with Charging Party's argument that the "Company's claim that the discharge of Johnny L. Faison on April 18, 1966 (Resp. Exh. 48(a)) is precedent for the discharge of Wilson rather than retransfer back to the scribe saw job is beside the mark, inasmuch as it appears that the job from which Faison had been transferred, in the Casing Room, had been abolished by the closing of that department and that, unlike the Wilson situation, there was no job remaining to which Faison could have been retransferred. Further, also in contrast to Wilson, Faison obviously could not have continued to be officially classified and paid as a Casing Room operator up to the date of his discharge."

Clark testified that on June 18 he thought that Wilson might have been scoring loins on purpose, although he had no such opinion on any date prior thereto. There is no basis in this record to support such finding. As Charging Party argues in its brief, it would be "absurd" to believe that "Wilson, a known Union activist and long-term employee who testified that he liked his job, deliberately scored loins under the very eyes of a supervisor who he believed was standing by to catch him making a mistake so that he could fire him."

> NLRB No. 176, TXD at 18, 81 LRRM 1142 (1972). Moreover, the timing of Wilson's discharge, nearly three months after the start of the organizing effort and a month after his alleged activity, also indicates an absence of unlawful motivation. Cf. *Tayko Industries, Inc.*, 214 NLRB No. 19, 88 LRRM 1046 (1974).

The burden is upon General Counsel to prove each violation alleged in the complaint by a preponderance of the evidence. It is true, as Respondent argues, that there were more prominent union activists in the plant who were not discharged. This does not establish that Wilson's discharge was unrelated to Respondent's knowledge that he was supporting the Union. It is not unknown for an employer to discharge employees innocent of any union activity in order to suggest to his work force that everyone's job is in jeopardy so long as there is any union activity in his plant. It is possible in this case that management believed it would inhibit the Union's campaign if it issued major violations more freely and automatically terminate employees for the third such violation, as was done in the cases of Chavis and Wilson. I indulge in this speculation, not because I rely on it to justify my findings, but to illustrate why I am unconvinced by Respondent's argument.

I find that the reason assigned for Wilson's discharge is implausible and that it was advanced to conceal another reason. In the circumstances of this case, explicated more fully in the discussion of Chavis' discharge, I find such other reason was Wilson's known union sympathies. Accordingly, I find, as alleged in the complaint, that Roy Gene Wilson was discharged because of his union activities and to discourage membership in the Union. I further find that Respondent thereby has violated Section 8(a)(3) of the Act and by such conduct has interfered with, restrained, and coerced employees in the exercise of their self-organizational rights guaranteed in Section 7 thereby violating Section 8(a)(1).

3. John Darious Faison

John Faison was hired in June 1971 and was terminated

on June 26, 1974. About May 1 he signed a union authorization card at the home of Willard Chavis. Thereafter, he successfully solicited various employees to sign union authorization cards during visits at their homes in the evenings.[66] In addition, he regularly attended the union meetings. There was considerable testimony as to whether prior to Faison's discharge the Company was aware of his union activities. As I find, for the reasons set forth below, that Faison was discharged for cause and not for his union activities, it is unnecessary to summarize the evidence relating to Respondent's alleged knowledge of Faison's union activities.

Faison was employed as a jack puller. His basic job task was to move heavy tanks of pork bellies from the cut department to the cure department. If, when he brought a tank of pork bellies into the cure room, it was not immediately required for processing, he would deposit the tank near the door. However, if the pork bellies were required for processing, he would pull the tank of bellies to the injector feeder machines. The machine operators occasionally helped Faison move the tank of bellies within the cure room.[67]

The basis for the alleged discrimination against Faison arises from his testimony that on June 26 when he was pulling a tank of pork bellies into the curing room one of the operators, Harold Boykin, called to him to bring the bellies to Boykin's machine. Faison asked Boykin to come over and help pull the tank of bellies. However, the foreman in the curing room, Paul Vann, instructed Boykin not to help Faison. It is this instruction that is alleged to have been discriminatory. Faison pulled the tank of bellies to the machine without help.[68]

[66] Faison testified that he obtained 15 authorization cards within a period of 2 weeks.

[67] There is a conflict in testimony as to the circumstances under which Faison was given assistance in pulling the belly tanks when he was in the cure room. Upon considering all the testimony on the subject, I am of the opinion that the practice was for the machine operators, only if not otherwise occupied, to assist Faison.

[68] In substance, Faison's testimony was corroborated by Raymond Turner. Turner was not an unbiased witness. He testified that he voluntarily quit his employ with the Company because he considered he was being unfairly criticized "every other day" by Foreman Paul Vann.

Vann denied that he had instructed Boykin not to help Faison and further denied that he had instructed any employee not to help Faison. I credit these denials. Vann, who gave his testimony in a straightforward, direct manner, impressed me as being a reliable witness.

The circumstances which led to Faison's termination were as follows:[69] In the afternoon on June 26 Faison was pulling a tank of pork bellies into the cure room and one of the operators called to him to bring the tank to the injector feeder machine. Faison seemed to hesitate and Vann told him to pull the tank to the machines. As Faison began to pull the tank he said to Vann, "I am not carrying another damn tank of bellies over there unless you give me someone to help me." Later the same afternoon Faison was moving another tank into the cure room and Vann told him to take it to the machine. After Faison had deposited the tank and as he passed Vann, he said to Vann, "I thought you did at least have some common sense . . . you are crazy, making me carry these bellies over there." A third exchange between Faison and Vann took place the same afternoon. About 4 p.m. that day Vann informed Faison that he was going to give him a violation for "quarreling, cursing, talking to me the way he did in front of my other employees in there loud enough for them to hear it." Faison said he would not sign the violation. Vann responded that if he did not sign the violation he would be considered to have quit his job.[70] At 4:30 p.m. Vann informed Faison that a violation had been written up and that he was to sign it. Faison said he would not sign any violation. Vann then informed him that he was terminated.[71]

Upon the credited testimony, I find that John Faison was discharged for cause.

[69] The summary is based largely on the testimony of Paul Vann whom I credit.

[70] The Company's policy was that any employee who refused to sign a so-called violation slip was automatically terminated.

[71] The violation form is called "Employee Warning Notice." The decision to give Faison a warning notice was made by Vann after consultation with other management officials.

F. *The Strike*

1. Reasons

On Monday, July 8, a strike began when 20 of the Company's employees left their work and walked out of the plant. On subsequent days additional employees joined the strike. The complaint alleges that the strike was caused by Respondent's unfair labor practices.

Chavis believed that he was discharged because of his union activities and Superintendent Everett Griffin testified that in the plant he overheard Chavis make a comment to such effect to a Government meat inspector. Johnny Burgess testified that on May 24 a group of men, including himself, Roy Gene Wilson, and Robert Smith, in the locker room, discussed a walkout. Wilson said to the group that "we might as well walk out because if they come at us like this one at a time." Burgess, however, discouraged any immediate walkout. According to Burgess, at a later date a group of employees, which included himself, Ellen Raynor, Diane Wilson, Robert Smith, and Edward Stevens, met at Ellen Raynor's home. Ellen Raynor said she thought there should be a walkout because she believed she was going to be fired just as Willard Chavis had been fired. She explained that she had been questioned at the plant about a union meeting which was held at her house the night before.[72]

The next time that there was discussion of a walkout was at one of the regular union meetings which was held on Sunday, July 7, at 7 p.m. at the Royal Garden Club in Warsaw. Approximately 34 persons attended the meeting of whom about 11 were wives or other relatives of plant employees. Seated at the head table were Johnny Burgess, chairman of the organizing committee, Diane Wilson, secretary of the organizing committee, and Union Representatives James Lawrence and Elsie Hales. Burgess opened the meeting and Otis Simmons said a prayer. The discussion then turned to the

[72] As the union meeting referred to took place on June 5, the foregoing discussion occurred on June 6 rather than June 3 as stated by Burgess.

question of a walkout. Burgess said that we should take Mr. Lundy at his word because he had said he had ways of finding out who signed union cards. They had fired Willard Chavis and Roy Gene Wilson who were working for the Union and if Ules Jackson is fired the next day we should walk out because "they was coming at us one at a time." Burgess also made reference to unjust violations that were being given to the employees, harassment of employees by foremen, and constant pressure being placed upon them. Other employees also spoke at the meeting.[73] Lawrence summarized what was said and then stated that it appeared they were determined to walk out. He cautioned them that if there was a walkout it might be for a long period.

The employees at the meeting voted upon the proposition that "if Ules Jackson was fired when he went to work on Monday, then [they would walk out because] they would know that the [Company's] intention was to fire all the union people until they were all fired out of the plant." The vote in favor of the proposition was unanimous.

On Monday, July 8, Ules Jackson was terminated. About 8 a.m., at a signal from Burgess, approximately 20 employees walked out.

On the first day of the strike Union Representative Elsie Hales brought the striking employees a small handbill, which some carried, which read:

[73] Willard Chavis said that either they were going to fight for their rights or the Company was going to chop them all off until everyone in the plant who were members of or working for the Union was replaced. Smith said that if only a few people walked out it was not going to stop Mr. Lundy; if enough walked-out it might slow him down. Underwood spoke about the unjust violations the Company was giving the employees and the constant pressure that was being placed on the employees by the supervisors and that they were determined to do something about it.

This is our protest!

Cuts in pay, reprimands, firings, murderous pressure, from the Company has left us no alternative!
We are taking this method to inform the rest of the Lundy Workers, and the public,
WE DON'T INTEND TO TAKE THIS TREATMENT ANY LONGER!
Issued by: The Lundy Organizing Committee

As the strike progressed regular picketing of the Company's premises was organized. Among the signs carried by the pickets were:

"Lundy Workers Protest Illegal Discharges"
"We Stopped Work To Stop The Illegal Discharges"
"Lundy Workers Protest Illegal Harassment"[74]

2. Progressive walkout

On July 8, at 7:48 a.m., 20 employees walked out on strike; on July 9, at 8:06 a.m., 2 more joined the strike; on July 10, at 6:57 a.m., an additional 2; on July 11, between 6:56 and 7:30 a.m., 11 more joined the strike; on July 12, at 10:30 a.m., 1 additional employee joined the strike; on July 15, at various times, 7 employees walked out and joined the strike; and lastly a single employee joined the strike on July 22. Thus, from the initial 20 who walked out in the morning on July 8 the number of strikers grew to a total of 44. Respondent refers to testimony by Burgess where he acknowledged that he told a newspaper reporter after the strike began, "We was going to pull people out one or two at a time if necessary. . . . we didn't want to shut him down, all we wanted to do was to

[74] In its brief Respondent argues that General Counsel's witnesses testified that, in addition to the alleged unlawful discharges, it was supervisory harassment, unjust tickets, cuts in pay, and strict rule enforcement, none of which are alleged to be unlawful, that were causes of the strike. However, in determining whether a strike is an unfair labor practice strike the question is whether unfair labor practices were among the causes of the strike. If so, the strike is an unfair labor practice strike even though the strikers also may have been protesting other matters.

talk to him." Respondent argues, "The walkout staged by Respondent's employees was staggered according to plan, as shown by the declared intention of committee chairman Burgess. Moreover, the time and the manner in which each employee walked out was in accordance with the declared plan to conduct a walkout in a way analogous to an unprotected intermittent strike, so as to prevent or at least impede Respondent's lawful efforts to hire replacements. The right to strike does not carry with it the additional right to determine the timing and the duration of the strike. *American Shipbuilding Co. v. N.L.R.B.*, 380 U.S. 300, 58 LRRM 2672 (1965). Therefore, inasmuch as the strike at Respondent's plant was analogous to an unprotected intermittent or quickie strike, both in form and effect, it is submitted that the walkout was unprotected and that the strikers have no right to reinstatement." I find no merit to this argument for two reasons. First, the statement by Burgess to a newspaper reporter is not in itself proof that the strike plan was to bring out employees a few at a time.[75] Second, even if that were the plan, there was nothing improper in an arrangement whereby additional employees would be called upon to join the strike as the strike progressed. One of the objects of a strike and picketing is to induce more and more employees to make common cause with the strikers, to leave their jobs and to join the strike. Whether this occurs by prearrangement, by happenstance, or otherwise, it does not cause the strike to lose its protected character. Respondent's argument, in effect, is that if employees join the strike after the first day the strike loses its protected character. There is no acceptable precedent for this position.

3. Alleged illegal object

Shortly after the strike began George Walston, a reporter for a local radio station, interviewed Johnny Burgess and Weldon Underwood. Among the things that Burgess said to Walston were: "Well, there was eleven people walked out this morning that we asked to come out to join us to show him that we mean business and that we want to negotiate a

[75] See *Tennessee Plastics, Inc.*, 215 NLRB No. 52 (1974), and cases there cited.

deal with him and his plant if he would see us to get this over with but if he don't want to negotiate with us, we are gonna stop all trucks going into his gate that's union. Of today, we are on strike." Also, Burgess told Walston that we want to "[n]egotiate a deal with Mr. Lundy to get some of those foremen and supervisors off our backs where we can do our work like it is supposed to be done." James L. Austin, a member of Respondent's board of directors, testified that Johnny Burgess telephoned him one day and asked him to try to arrange a meeting with Mr. Lundy.

From the foregoing, Respondent appears to contend that the purpose of the strike is to negotiate a contract with the Company and, as the Union does not represent a majority of the employees, the object of the strike is unlawful. There is no merit to the position that the purpose of the strike is to compel negotiations and thereby gain recognition. First, at no time has the Union made any request for recognition, bargaining, or negotiations. Second, there is no evidence that Burgess had authority personally and unilaterally to define the objectives of the strike.[76] Third, Burgess' statements were not inconsistent with the purpose of the strike; namely, to cause the Company to correct various employee complaints, including remedying its unfair labor practices, particularly the unlawful discharges of Chavis and Wilson.

4. Refusal to reinstate strikers

On July 26 John Russell, president of the Union, sent a letter to the Company in which he transmitted an unconditional offer to return to work on behalf of each striking employee. On August 1 the Company responded by letter in which it stated that it does not consider the employees who walked off their jobs to be unfair labor practice strikers and "we have also exercised our lawful right to permanently replace them." Thereafter, each striking employee, who is listed on Appendix A attached to this Decision, sent identical letters

[76] See *N.L.R.B. v. Okla-Inn, d/b/a Holiday Inn of Henryetta*, 488 F. 2d 498 (C.A. 10, 1973).

to the Company individually offering to return to work without condition. On August 12 each of these employees was sent a letter by the Company which, in relevant part, states: "In exercising our right to treat you as an economic striker, we hired permanent replacements for all vacancies. Therefore, at the present time The Lundy Packing Company has no job available for you."

5. Character of the strike

The union activities of Respondent's employees were directed towards achieving various objectives which included improvements in their conditions of employment and, in time, recognition of their representative should they succeed in enlisting the support of a majority. These objectives did not disappear when the employees went on strike. Respondent vehemently opposes a union representing its employees. Its response to its employees' self-organizational activities included the commission of the unfair labor practices found above. A direct relationship therefore exists between Respondent's unfair labor practices and its employees' concerted activities from which they sprang. Accordingly, the strike protesting the Company's unfair labor practices necessarily encompasses the employees' underlying objectives as the two are entwined, one having arisen because of the other. It is well settled that a strike still "may be an unfair labor practice strike even though it also has economic objectives." *N.L.R.B. v. Fitzgerald Mills Corporation*, 313 F.2d 260, 269 (C.A. 2), cert. denied 375 U. S. 834 (1963). "Where the causes contributing to a strike consist of unfair labor practices and employee desires for wage betterments, the latter should not excuse the employer from the legal consequences that flow from its conduct which transcends the permissible bounds under the National Labor Relations Act." *N.L.R.B. v. Stilley Plywood Company, Inc.*, 199 F. 2d 319, 320-321 (C.A. 4, 1952).

As reflected by the transactions at the July 7 union meeting, the immediate concern of the employees was that the Company was going to discharge the union supporters one at a time. Chavis, Wilson, and Faison already had been terminated

and the employees were conscious of the fact that President Lundy had suggested that he had ways of finding out who had signed union cards. For reasons not disclosed in the record, the employees at the meeting feared that Ules Jackson might be discharged the next day and believed that if he was it would be because of Jackson's union activities. It was decided that should Jackson be discharged they would strike. Jackson was discharged and a strike was called. The strike thus was triggered by Jackson's discharge which has not been found to be unlawful. However, while the immediate impetus of the strike was Jackson's discharge, the proximate cause of the strike was the fear that Respondent had means of ascertaining who the union supporters were and would discharge them one at a time. This fear was generated by the Company's unlawful activities, found above, and by the series of discharges commencing with Chavis' termination on May 24 and including Wilson's discharge on June 18, both of which I find were unlawful. The strike therefore is an unfair labor strike.[77]

Respondent argues: "Even if unfair labor practices are found, the weight of the evidence indicates that it was the discharge of Ules Jackson on July 8, and a general frustration at not being able to organize and force Respondent to negotiate that actually caused the walkout. Thus, union representative Lawrence and committee member Otis Simmons testified that the proposition voted on at the July 7 meeting was to strike *if* Ules Jackson was fired the next day. Therefore, it is fair to conclude that *but for* the discharge of Jackson, there would have been no strike, and this indicates that the other asserted reasons for the walkout were mere afterthoughts dreamed up by the strikers after Jackson's unfair labor practice charge was dismissed." I find no merit to this argument.[78] Among the asserted reasons for the strike were the unlawful discharges of Chavis and Wilson. They were not mere afterthoughts. "Having violated the Act, the Respondent cannot

[77] *Colonial Lincoln Mercury Sales, Inc.*, 197 NLRB 54, 63-64 (1972), enfd. 485 F.2d 455 (C.A. 5, 1973); *Matlock Truck Body & Trailer Corp.*, 217 NLRB No. 60 (1975), and cases there cited. *N.L.R.B. v. Comfort, Inc.*, 365 F.2d 867 (C.A. 8, 1966).

[78] *Colonial Lincoln Mercury Sales, Inc., supra.*

choose the one of several causes of the strike that is most favorable to its position." *N.L.R.B. v. Louisville Chair Company, Inc.*, 385 F. 2d 922, 929 (C.A. 6), cert. denied 390 U. S. 1013 (1967). As stated in *Matlock Truck Body & Trailer Corp., supra*, footnote 33, "[T]he burden is on the Respondents to demonstrate that the strike would have occurred and would have continued irrespective of its unfair labor practices, rather than upon the General Counsel to demonstrate the contrary, that is, that but for Respondent's unfair labor practices there would have been no strike and that it would not have lasted so long. See *N.L.R.B. v. Stackpole Carbon Company*, 135 F.2d 959, 961-962 (C.A. 7, 1943); *Wooster Division of Borg-Warner Corporation*, 121 NLRB 1492 (1958); *Phillip Carey Manufacturing Company, Miami Cabinet Division v. N.L.R.B.*, 331 F. 2d 720, 729 (C.A. 6, 1964), cert. denied 379 U. S. 888." Respondent has not sustained this burden.

A strike in protest over employer violations of the Act is an "unfair labor practice" strike and "the striking employees do not lose their status and are entitled to reinstatement . . . even if [permanent] replacements for them have been made." *Mastro Plastics Corp. v. N.L.R.B.*, 350 U.S. 270, 278 (1956). "Unfair labor practice strikers must be rehired on demand . . . even though there were also other causes of the strike." *N.L.R.B. v. Fitzgerald Mills Corp., supra.* On July 26 an unconditional request for reinstatement of the strikers was made and on August 1 the Company denied such request. Accordingly, I find that Respondent has further violated Section 8(a)(3) and (1) by its refusal since August 1 to restore the striking employees listed on Appendix A attached hereto to their former jobs.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent unlawfully discharged employees Willard Chavis and Roy Gene Wilson on May 24 and June 18, 1974, respectively, I shall recommend that Respondent offer each of them immediate and full reinstatement to his former job[79] or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges, and make him whole for any loss of earnings he may have suffered by reason of the discrimination against him by payment to him of a sum of money equal to that which he normally would have earned from the aforesaid date of his termination to the date of Respondent's offer of reinstatement, less his net earnings during such period. The backpay provided for herein shall be computed on the basis of calendar quarters, in accordance with the method prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950). Interest at the rate of 6 percent per annum shall be added to such net backpay and shall be computed in the manner set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Having found that the Respondent since August 1, 1974, unlawfully has failed and has refused to restore each of the striking employees listed on Appendix A attached hereto to his or her former job, I shall recommend that Respondent offer each such employee immediate and full reinstatement to his or her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his or her seniority and other rights and privileges, and make each of them whole for any loss of earnings he or she may have suffered by payment to him or her of a sum of money equal to that which he or she normally would have earned from August 1, 1974, to the date of Respondent's offer of reinstatement less his or her net earnings during such period. The backpay provided for herein shall be computed on the basis of calendar quarters, in accordance with the method prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950). Interest at the rate of 6 percent per annum shall be added to such net backpay and shall be computed in the manner set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[79] As I have found that Respondent's unlawful discrimination against Wilson, in part, is related to Respondent's refusal to reassign him to his job as scriber, reinstatement to his former job, in the case of Wilson, contemplates reinstatement to the job of scriber.

Respondent's unlawful activities, including its discriminatory discharges of Willard Chavis and Roy Gene Wilson and its unlawful refusal to reinstate its striking employees after they unconditionally applied for reinstatement, go to the very heart of the Act and indicate a purpose to defeat self-organization of its employees. The unfair labor practices committed by the Respondent are potentially related to other unfair labor practices proscribed by the Act, and the danger of their commission in the future is to be anticipated from Respondent's conduct in the past. The preventive purposes of the Act will be thwarted unless the recommended Order herein is coextensive with the threat. Accordingly, in order to make effective the interdependent guarantees of Section 7 and thus effectuate the policies of the Act, an order reguiring Respondent to cease and desist from in any manner infringing upon the rights of employees guaranteed in the Act is deemed necessary. *N.L.R.B. v. Express Publishing Company*, 312 U.S. 426 (1941); *N.L.R.B. v. Entwistle Mfg. Co.*, 120 F. 2d 532 (C.A. 4, 1941).

Upon the basis of the foregoing findings of fact and upon the entire record in this case, I make the following:

Conclusions of Law

1. By discriminatorily discharging Willard Chavis on May 24, 1974, and Roy Gene Wilson on June 18, 1974, thereby discouraging membership in the Union, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

2. The strike of Respondent's employees which began on July 8, 1974, was caused by Respondent's unfair labor practices herein found.

3. By refusing and failing since August 1, 1974, to reinstate its striking employees listed in Appendix A attached hereto, thereby discriminating in regard to their reinstatement, tenure of employment, and conditions of employment, and discouraging membership in the Union, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

4. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER [80]

Respondent, The Lundy Packing Company, Clinton, North Carolina, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against employees in regard to their hire, tenure of employment, or other terms and conditions of their employment in order to discourage membership in Local 525, Meat, Food and Allied

[80] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

Workers Union, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL–CIO, or any other labor organization.

(b) Threatening employees with discharge or other reprisals to discourage membership in or other activities on behalf of the above Union, or any other labor organization.

(c) Promulgating, enforcing, or maintaining in effect any rule which unlawfully prohibits employees from distributing union literature on company property.

(d) Unlawfully questioning employees about the union activities of other employees.

(e) Keeping under surveillance, or creating the impression that it is keeping under surveillance, the union activities of its employees.

(f) In any other manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Offer Willard Chavis and Roy Gene Wilson immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, and make each of them whole for any loss of earnings he may have suffered by reason of Respondent's unlawful discrimination against him in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Offer the striking employees named in Appendix A attached hereto immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, dismissing, if necessary, any persons hired as replacements on and after July 8, 1974. If after such dismissals sufficient jobs are not available for all these employees, they shall be placed on a preferential hiring list in accordance with their seniority or other nondiscriminatory practices theretofore utilized by the Company, and they shall be offered employment before any other persons are hired.

(c) Make each of the striking employees named in Appendix A attached hereto whole for any loss of earnings he or she may have suffered since August 1, 1974, in the manner set forth in the section of this Decision entitled "The Remedy."

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(e) Post at its place of business in Clinton, North Carolina, copies of the attached notice marked "Appendix B."[81] Copies of said notice, on forms provided by the Regional Director for Region 11, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 11, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS ALSO ORDERED that the allegations in the complaint of violations of Section 8(a)(1) and (3) be dismissed except insofar as specific findings of violations of those sections have been made above.

Dated at Washington, D. C. May 28, 1975

Herbert Silberman
Administrative Law Judge

[81] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX A

Nathan Joe Banks
Jesse L. Barksdale
Milford Bethune
Truman Blue
Billy R. Boone
James E. Boone
Ronald Bowen
Johnny Burgess
Richard G. Carr
Elzato Copeland
Irene Copeland
Kenneth Faison
Hubert Fryar
Caldon R. Herring
Wesley P. Jefferson
Bryson R. Johnson
Clarence King
James A. King
John King, Jr.
Leroy King
Ray M. Lewis
Harry L. Melvin
Jesse C. Melvin
Curtis Mimms
George Monk, Jr.
William M. Morrisey
Charlie Newton
Linwood F. Owens
Willie Parker
Ellen Raynor
Elwood F. Raynor
Mary Raynor
Weldon Raynor
Otis Simmons
Everette L. Smith
Robert Smith, Jr.
Daniel J. Stevens
Edward Stevens
Sonnie Boy Stevens
Douglas Underwood
Weldon Underwood
Brady Waters
Vernon Williams
Diane Wilson

Supreme Court, U. S.
FILED
MAY 23 1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-1457

THE LUNDY PACKING COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD AND LOCAL 525, MEAT & ALLIED FOOD WORKERS UNION, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

IRVING M. KING,
THOMAS D. ALLISON,
Counsel for Respondent Local 525, Meat & Allied Food Workers Union, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO.

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IN THE

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OCTOBER TERM, 1976.

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THE LUNDY PACKING COMPANY,

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vs.

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Respondents.[1]

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

OPINIONS BELOW.

Petitioner has accurately reported the citation to the decisions and orders of the National Labor Relations Board and the Administrative Law Judge. The opinion of the Court of Appeals for the Fourth Circuit is reported at 549 F. 2d 300.

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1. The caption has been corrected to include Local 525, Meat & Allied Food Workers Union, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Intervenor below, in compliance with Rule 21(6) of this Court.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED.

Whether the Court of Appeals for the Fourth Circuit, the National Labor Relations Board, and the Administrative Law Judge were correct in their unanimous findings that the strike of Petitioner's employees commencing on July 8, 1974 was caused by Petitioner's now uncontested unfair labor practices.

STATUTES INVOLVED.

Pertinent provisions of the National Labor Relations Act, as amended, 29 U. S. C. § 151, *et seq.*, are set forth in the Petition.

STATEMENT OF THE CASE.

Petitioner Lundy Packing Company (hereinafter referred to as "the Company") is a major producer of pork products for interstate sale throughout the East Coast Region. Petitioner's plant in Clinton, North Carolina, slaughters 4,000 hogs per day, thereafter selling the loins at the highest price received by any pork packer.

Petitioner's employees commenced lawful organizing for representation by Local 525, Meat & Allied Food Workers Union, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO (hereinafter referred to as "the Union"), in April, 1974. The Company immediately responded with a naked display of anti-union coercion and intimidation which is spread over 2,000 pages of transcript, and accurately reported in the thorough decision of the Administrative Law Judge (App. 7-69), subsequently adopted by the National Labor Relations

Board (App. 3-7) and enforced in all but a minor respect by the Court of Appeals for the Fourth Circuit (App. 1-2).[2]

The Administrative Law Judge, the National Labor Relations Board, and the Court of Appeals found that the Company had threatened, coerced, interrogated, created the impression of surveillance, and promulgated an unlawful no-distribution rule, all in violation of Section 8(a)(1) of the National Labor Relations Act (hereinafter referred to as "the Act"), and unlawfully discharged employees and refused to reinstate unfair labor practice strikers, all in violation of Sections 8(a)(1) and 8(a)(3) of the Act. More particularly, these tribunals have found that the Company: on June 6, 1974[3] unlawfully interrogated an employee, Ellen Raynor, as to what role each employee on a written list displayed to her had played in the Union's organizing campaign; created the impression of surveillance on June 6 and June 17 by supervisors' asking various employees why such supervisors had not been invited to specific Union meetings;[4] unlawfully maintained a written rule prohibiting employees under threat of discharge from distributing any printed matter on Company property, including Union literature; unlawfully discharged Williard Chavis on May 24 because of his Union activities and to discourage membership in the Union; and unlawfully discharged Roy Gene Wilson on June 18 for his Union activities and to discourage membership in the Union. These violations of the National Labor Relations Act were unanimously affirmed by the National Labor Relations Board and the Court

2. References to the Appendix filed by Petitioner in this Court shall be "App. ....." References to the Appendix filed in the Court of Appeals shall be "App. Below ....."

3. All dates are in 1974.

4. It was subsequently discovered at hearing, although not charged in the original complaint, that the Company on May 9 formally established an extensive network of written spy reports from Company supervisors concerning all suspected Union activity, resulting in the receipt of about 300 such written reports by the close of hearing. At hearing the Company refused to comply with a *subpoena duces tecum*, upheld by the Administrative Law Judge, requesting the documents (App. 12-15).

of Appeals.[5] The Company has now abandoned all contest of its guilt of the flagrant unfair labor practices found.

On May 24, 1974, after Willard Chavis was illegally fired, employees met and discussed walking out in protest of the Company's unfair labor practices. In a later meeting shortly after the illegal June 6 interrogation of Ellen Rayner, Ms. Rayner again urged the employees to walk out, because the Company was about to fire her as they had fired Willard Chavis (App. Below, 472-474).

Following the illegal discharge of a second employee, Roy Gene Wilson, the employees met on July 7, 1974. Union Organizing Committee Chairman Johnny Burgess spoke to his fellow employees about the firing of Willard Chavis and Roy Gene Wilson. Burgess talked about the unjust tickets the employees were receiving, the harassment from the foremen, the constant pressure being placed on them due to their Union activities, and the walk out which the employees were discussing among themselves (App. Below, 431). Following Burgess' statements, James Lawrence, Willard Chavis and Weldon Underwood spoke to the employees, reiterating Burgess' remarks about the illegal firing of Chavis and Wilson, and the harassment and constant pressure by the Company (App. Below 432-436, 440-460, 465-471).

Against this backdrop of repeated unfair labor practices and illegal firings over the prior two months, the employees voted unanimously to walk out. The proposition voted upon was "if Ules Jackson was fired when he went to work on Monday, then they would know that the Company intentions was to fire all of the Union people until they were all fired out of that plant"

5. The Administrative Law Judge also found, and the National Labor Relations Board confirmed, that an additional violation of the Act had occurred on May 8, when Company President Burrows T. Lundy, Sr., unlawfully threatened and coerced employees by in effect telling them he would find out which employees had signed Union cards. This finding was reversed by the Court of Appeals as a matter of law, and no review of this reversal is requested.

(App. Below, 434-435). The next day, Ules Jackson was fired,[6] and the employees walked out.

As soon as the strike began, Mr. Burgess began wearing a sign on the picket line protesting the firings, reprimands, cuts in pay and so forth (App. Below, 1233). Burgess told a newspaper reporter that day that the employees were "striking because of Willard Chavis and all of them getting fired," and for unfairness and harrassment (App. Below, 481). After a picketing permit had been obtained, pickets carried signs protesting "Illegal Discharges", "Unfair Labor Practices", "Discrimination" and "Unjust Firings" (App. Below, 1226-1231). From the first moment of the strike, picket signs continuously protested the unlawful firings and other unfair labor practices, and proclaimed the strike to be an unfair labor practice strike. No characteristics of an economic strike were ever present. No request was ever made to the Company to recognize the Union. to negotiate a collective bargaining agreement, or, indeed, to deal with the Union at all (App. Below, 1118-1119).

After a thorough review of the facts, the Administrative Law Judge found (App. 62):

> [T]he proximate cause of the strike was the fear that [the Company] had means of ascertaining who the union supporters were and would discharge them one at a time. This fear was generated by the Company's unlawful activities, found above, and by the series of discharges commencing with Chavis' termination on May 24 and including Wilson's discharge on June 18, both of which I find were unlawful. The strike therefore is an unfair labor practice strike.

The Administrative Law Judge's factual finding of an unfair labor practice strike, based on over 2,000 pages of testimony, was unanimously approved by the National Labor Relations

6. The legality or illegality of the discharge of Ules Jackson has never been determined by the Board. Instead, the Regional Director of the Eleventh Region of the National Labor Relations Board administratively determined prior to hearing not to issue a complaint in connection with Jackson's firing. As a consequence, no hearing has ever been held concerning the legality of the Jackson discharge.

Board and the Court of Appeals for the Fourth Circuit. Desperately trying to avoid the financial consequences of its illegal discharges and other flagrant unfair labor practices, the Company asks this Court to overturn this finding which is so firmly rooted in the record.

ARGUMENT.

There Is No Conflict Among the Circuits.

In response to the Company's argument that the strike was related to other Company actions not found to be unfair labor practices, the Administrative Law Judge ruled (App. 58, n. 74):

> [I]n determining whether a strike is an unfair labor practice strike the question is whether unfair labor practices were among the causes of the strike. If so, the strike is an unfair labor practice strike even though the strikers also may have been protesting other matters.

The Company's current attempt to argue that the Judge's legal analysis reflects a division of authority among the Circuits is flatly wrong, and should be rejected. Since the passage of the National Labor Relations Act in 1935, thousands of cases involving the factual finding of an unfair labor practice strike have been routinely and uniformly dealt with by the National Labor Relations Board and the Federal courts. From the outset, a strike has been judged to be an unfair labor practice strike if at least one cause of the strike is the Employer's unfair labor practices. See *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. 2d 862, 872 (2d Cir. 1938).

This legal principle has been uniformly applied by the National Labor Relations Board. With the most minor variations in language, all of which state the same fundamental test, this principle has been consistently applied by the Courts of Appeals. The cases referred to on pages 8 to 10 of Petitioner's Brief conclusively confirm that no substantial disagreement on this point has arisen among the Circuits in forty years of developing case law. Petitioner's attempt to establish an artificial conflict among the Circuits is wholly unsupported by the case law and should be rejected.

The Finding of an Unfair Labor Practice Strike Is Overwhelmingly Supported by the Record.

The Administrative Law Judge, National Labor Relations Board, and Court of Appeals all found unanimously that the strike commencing on July 8, 1974 was caused by the Company's repeated unfair labor practices over the preceding two months, including the illegal discharges of Willard Chavis and Roy Gene Wilson. This finding is overwhelmingly supported by the record, and should not be set aside. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474 (1951).

The Company's current attempt to portray itself as ingenuously uncertain as to the nature of the strike is not only legally irrelevant to any factual findings, but also wholly unsupported by the record. The picket signs from the first day of the strike, the public statements of the striking employees, the unfair labor practice charge and complaint, the lack of any economic component to the strike, and, presumably, the hundreds of internal spy reports all placed the Company on full notice that its employees were striking as a result of, and in protest against, the massive illegal actions by the Company.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Rsepectfully submitted,

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In the Supreme Court of the United States

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LUNDY PACKING COMPANY, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is reported at 549 F. 2d 300. The decision and order of the National Labor Relations Board (Pet. App. 3-69) are reported at 223 NLRB 139.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1977. Petitioner's request for rehearing *en banc* was denied on March 18, 1977. The petition for a writ of certiorari was filed on April 21, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the employees' strike was caused by the employer's unfair labor practices.

STATUTE INVOLVED

The relevant provisions of Section 8 of the National Labor Relations Act, as amended, 61 Stat. 140, 73 Stat. 525, 542, 29 U.S.C. 158, are set forth at page 3 of the petition.

STATEMENT

In April 1974, employees at petitioner Company's hog slaughtering and processing plant in Clinton, North Carolina, began an organizational campaign on behalf of the Union[1] (Pet. App. 11). The Board found that the Company, during its active opposition to the campaign, violated the National Labor Relations Act by:

(1) discriminatorily discharging two union activists, Willard Chavis (Pet. App. 38), and Roy Wilson (Pet. App. 53);

(2) maintaining an overly broad no-distribution rule (Pet. App. 22);

(3) coercing employees through threatening statements in a speech given to assembled employees by Company President Lundy (Pet. App. 4-5, 20-21);

(4) coercively interrogating employee Ellen Raynor concerning the role played by certain fellow employees in the organizational campaign (Pet. App. 24);

(5) creating the impression that union meetings were under surveillance (Pet. App. 28).

In addition, the Board held that the Company violated Section 8(a)(3) and (1) of the Act by refusing to reinstate 44 striking employees who the Board found to be unfair labor

[1]Local 525, Meat, Food and Allied Workers Union, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO.

practice strikers (Pet. App. 63). The court of appeals, in a *per curiam* opinion, upheld the Board's decision, except for the finding that Company President Lundy's speech was unlawful (Pet. App. 2).

The Company here challenges only the Board's finding that the strike was caused by the Company's unfair labor practices and that therefore the striking employees were entitled to reinstatement upon their unconditional offers to return to work. The facts pertaining to this issue follow:

Union activist Willard Chavis, who had solicited some 75 of the Company's 300 employees to sign authorization cards for the Union, was discharged on May 24, 1974 (Pet. App. 28-29, 35-36; A. 94-97).[2] Chavis was convinced he was fired because of his union activities (Pet. App. 56; A. 134, 643-646, 896-897), and the Board subsequently so found (Pet. App. 38). Shortly after Chavis left the plant, Johnny Burgess, chairman of the employees' organizing committee, Roy Wilson, who was himself later discharged for his union activities, and other employees talked in the locker room about walking out in protest. Wilson said, "[W]e might as well walk out because * * * they [might] come at us like this one at a time." Burgess agreed but stated that the employees "can't go out now," as only one man had been fired. (Pet. App. 56; A. 471-473.)

Two weeks later, on June 6, the in-plant organizing committee met at Ellen Raynor's house. Raynor advocated a walkout because she had been questioned at the plant that day about a union meeting at her house on June 5, and she therefore feared that she would be fired (Pet. App. 56; A. 473-474).[3] On June 18, Wilson was discharged (Pet. App.

[2]"A." references are to the appendix in the court of appeals, a copy of which has been filed with the Clerk of this Court.

[3]The Board found that this interrogation violated Section 8(a)(1) of the Act (Pet. App. 22-24).

38). Like Chavis, he assumed he was terminated because of his union activities,[4] and he discussed these convictions with others before he left the plant (A. 532, 788).[5]

Thereafter, at a union meeting held on July 7 and attended by about 34 employees, a decision was made to strike in protest over the Company's conduct (Pet. App. 56-57; A. 430-431, 438, 441). The employees complained about unjust discipline for rule violations, harassment by supervisors, and constant pressure because of union activities (Pet. App. 56-57; A. 431-436, 442, 470-471).[6] Burgess argued that the employees should "take Mr. Lundy at his word because he said he had ways of finding out who signed union cards, and they had fired Willard Chavis and Roy Gene [Wilson], who was working for the union, and if Ules Jackson got fired * * *, we would walk out because they was coming at us one at a time" (Pet. App. 57; A. 442, 469-470). Chavis added that the employees would "have to fight for their rights or the Company was going to chop them all off until everybody in that plant * * * [who were] members of the union or working for the union" was replaced (Pet. App. 57 n. 73; A. 435). One of the Union's staff organizers stated that the employees appeared determined to walk out because of the discharges and the pressure upon them (Pet. App. 57; A. 432-434, 471). Burgess then proposed that, "if Ules Jackson was fired when he went to work on Monday, then [they

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[4]The Board so found (Pet. App. 53).

[5]On June 26, the Company also discharged another union activist, John D. Faison (Pet. App. 53-54; A. 353-354). The Board found, however, that he was fired for cause (Pet. App. 53-55).

[6]Before it fired Chavis and Wilson, the Company gave them a number of reprimands for faulty work which the Board found to be unjustified and issued for the purpose of supporting the Company's pretextual grounds for discharging the two employees (Pet. App. 31-32, 34, 35, 42, 45, 46).

would walk out because] they would know that the [Company's] intentions was to fire all of the union people until they were all fired * * *." By a unanimous vote, the employees agreed to that course of action (Pet. App. 57; A. 434-435).

Jackson was in fact discharged the next day, July 8, and approximately 20 employees walked out upon a signal from Burgess (Pet. App. 57; A. 471, 585).[7] Some strikers carried small handbills which declared (Pet. App. 57-58; A. 487-488, 1233):

> *This is our Protest!*
>
> Cuts in pay, reprimands, firings, murderous pressure, from the Company has left us no alternative!
>
> We are taking this method to inform the rest of the Lundy Workers, and the public.
>
> WE DON'T INTEND TO TAKE THIS TREATMENT ANY LONGER!
>
> Issued by: The Lundy Organizing Committee.

Picketing of the Company's premises ensued, at which the striking employees carried signs protesting "illegal discharges," "unfair treatment," "illegal harassment," and "unfair labor practices" (Pet. App. 58; A. 417, 1226, 1227, 1228, 1229, 1230, 1231). In the next two weeks, additional employees joined the strike, so that, by July 22, 44 employees were on strike (Pet. App. 58, 59; A. 1253).

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[7]In its first amended charge, the Union alleged that Jackson's discharge violated Section 8(a)(3) and (1) of the Act, but the complaint did not include this allegation (A. 4, 9). The Board found, however, that the Company violated Section 8(a)(1) when several of its supervisors approached Jackson and gave him the impression that the union meetings he had arranged were under surveillance (Pet. App. 26-27; A. 390-392).

On July 26, 1974, the Union's president submitted to the Company an unconditional offer, on behalf of all the striking employees, to return to work. The Company responded that it did not consider the employees to be unfair labor practice strikers and that it had "exercised [its] lawful right to permanently replace them." Later, each striking employee offered individually to return to work without condition. On August 12, the Company replied: "In exercising our right to treat you as an economic striker, we hired permanent replacements for all vacancies. Therefore, at the present time the Lundy Packing Company has no job available for you." (Pet. App. 60-61; A. 137-138, 1221, 1222.)

The Board, upholding the decision of the Administrative Law Judge, rejected petitioner's contention that the strike was caused by Jackson's lawful discharge and therefore was an economic, rather than an unfair labor practice, strike. The Law Judge stated (Pet. App. 61-62; footnote omitted):

> As reflected by the transactions at the July 7 union meeting, the immediate concern of the employees was that the Company was going to discharge the union supporters one at a time. Chavis, Wilson, and Faison already had been terminated and the employees were conscious of the fact that President Lundy had suggested that he had ways of finding out who had signed union cards. For reasons not disclosed in the record, the employees at the meeting feared that Ules Jackson might be discharged the next day and believed that if he was it would be because of Jackson's union activities. It was decided that should Jackson be discharged they would strike. Jackson was discharged and a strike was called. The strike thus was triggered by Jackson's discharge which has not been found to be unlawful. However, while the immediate impetus of the strike was Jackson's discharge, the proximate cause of the strike was the fear that Respondent had means of ascertaining who the union supporters were and would discharge them one at a time. This fear was generated by the Company's unlawful activities, found above, and by the series of discharges commencing with Chavis' termination on May 24 and including Wilson's discharge on June 18, both of which I find were unlawful. The strike therefore is an unfair labor [practice] strike.

The Law Judge concluded that the striking employees were entitled to reinstatement even though they had been permanently replaced (Pet. App. 63).

ARGUMENT

The Company concedes (Pet. 7) the long-settled proposition that unfair labor practice strikers are entitled to reinstatement even though permanent replacements were hired during the strike. *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U.S. 270, 278. The sole issue raised by the petition is whether substantial evidence supports the Board's finding that the strike was caused by the Company's unfair labor practices and therefore that the striking employees were unfair labor practice strikers.[8] That

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[8] There is no merit to petitioner's contention that there is a conflict among the circuits concerning the appropriate standard to apply to ascertain the nature of a strike. The law is clear that, "[i]f there was a causal connection between the unfair labor practices and the strike, the striking employees are entitled to reinstatement." *National Labor Relations Board* v. *Birmingham Publishing Company*, 262 F. 2d 2, 9-10 (C.A. 5; footnote omitted.) Accord: *National Labor Relations Board* v. *Comfort, Inc.*, 365 F. 2d 867, 873-874 (C.A. 8); *Larand Leisurelies, Inc.* v. *National Labor Relations Board*, 523 F. 2d 814, 820-821 (C.A. 6); *National Labor Relations Board* v. *Cast Optics Corp.*, 458 F. 2d 398, 407 (C.A. 3), certiorari denied, 409 U.S. 850; *National Labor Relations Board* v. *Safway Steel Scaffolds Company of Georgia*, 383 F. 2d 273,

factual issue does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 487-488.

In any event, the record amply supports the Board's conclusion that the employees' fear that union supporters would be discharged one by one was the "proximate cause" of the strike. This fear was clearly justified in view of the discharges of Chavis and Wilson, the interrogation of Raynor, and the Company's comments concerning surveillance of union meetings, all of which were found to be unfair labor practices. The fact that Jackson's discharge and Lundy's speech—conduct found to be lawful—provided added incentive to strike does not require a different conclusion. There is no disagreement among the circuits that, where lawful and unlawful conduct results in a strike, the burden is on the employer to prove that the strike would have occurred irrespective of its unfair labor practices. See cases cited at note 8, *supra*, and Pet. App. 63. The Board properly found that petitioner did not sustain this burden here.

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280 (C.A. 5), certiorari denied, 390 U.S. 955; *National Labor Relations Board* v. *Sea-Land Service, Inc.*, 356 F. 2d 955, 965-966 (C.A. 1), certiorari denied, 385 U.S. 900; *National Labor Relations Board* v. *My Store, Inc.*, 345 F. 2d 494, 498 (C.A. 7), certiorari denied, 382 U.S. 927; *National Labor Relations Board* v. *Southland Cork Company*, 342 F. 2d 702, 707-708 (C.A. 4); *General Drivers and Helpers Union Local 662* v. *National Labor Relations Board*, 302 F. 2d 908, 911 (C.A. D.C.), certiorari denied *sub nom. Rice Lake Creamery Co.* v. *General Drivers and Helpers Union, Local 662*, 371 U.S. 827; *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. 2d 862, 872 (C.A. 2), certiorari denied, 304 U.S. 576. The cases cited by the Company (Pet. 8-11) adhere to this standard, notwithstanding the choice of words used to express it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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REPLY BRIEF

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---

REPLY BRIEF

I. JURISDICTION

Pursuant to Rule 24(4) of the Supreme Court Rules, Petitioner files this Brief in Reply to Respondents' Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit. U.S. Sup. Ct. Rule 24(4), 28 U.S.C.

II. STATEMENT OF THE CASE

Petitioner contends that both the National Labor Relations Board and the Union have misrepresented

Petitioner's arguments in their Briefs in Opposition to Petitioner's Petition for Certiorari. Therefore, Petioner reiterates its contention that:

(1) The Administrative Law Judge, the National Labor Relations Board and the Court of Appeals for the Fourth Circuit applied an incorrect standard in deciding that the July 8 strike was caused by Petitioner's unfair labor practices. It is clear upon the record that the motivating force which was the admitted primary and substantial cause of the strike was the lawful discharge of employee Ules Jackson (Pet. 2).

(2) The standard that the Petitioner must "demonstrate that the strike would have occurred . . . irrespective of its unfair labor practices (A. 63)" is incorrect and was improperly applied to Petitioner in the instant case (Pet. 11).

(3) The Administrative Law Judge, the Board and the Court of Appeals for the Fourth Circuit should have found that the strike was not an unfair labor practice strike because any unfair labor practices Petitioner is found to have committed were neither the principal nor the motivating cause of the strike (Pet. 11).

(4) There is a substantial conflict among the Circuits as to the definition of what constitutes an unfair labor practice strike and this conflict can only be properly resolved by this Court (Pet. 6-11).

CONCLUSION

For the reasons stated, the Petition for Certiorari should be granted. Dated this 7th day of July, 1977.

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